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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

SEAN O'KEEFE, ACTING SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

ARLEN SPECTER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

KENNETH W. STARR
Solicitor General
STUART M. GERSON
Assistant Attorney General
JOHN G. ROBERTS, JR.
Deputy Solicitor General
ROBERT A. LONG, JR.
Assistant to the Solicitor General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether actions taken under the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808, by the Secretary of Defense, the Defense Base Closure and Realignment Commission, or the President constitute "final agency action" for purposes of the Administrative Procedure Act in light of *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	7
Conclusion	11
Appendix A	1a
Appendix B	52a
Appendix C	54a
Appendix D	61a

TABLE OF AUTHORITIES

Cases:

Franklin v. Massachusetts, 112 S. Ct. 2767 (1992) 8, 9, 10, 11

Constitution and statutes:

U.S. Const. Amend. V (Due Process Clause) 5

Administrative Procedure Act, 5 U.S.C. 701 *et seq.*:

5 U.S.C. 701(a)(2) 6

5 U.S.C. 704 (§ 10(c)) 2, 5, 8

Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808 2

§ 2902(a), 104 Stat. 1808 ..... 2, 61a

§ 2902(e), 104 Stat. 1808 ..... 2, 62a

§ 2903(a)(1), 104 Stat. 1810 ..... 2, 65a

§ 2903(a)(2), 104 Stat. 1810 ..... 2, 65a

§ 2903(c), 104 Stat. 1811 ..... 3, 67a

§ 2903(c)(1), 104 Stat. 1811 ..... 2, 67a

§ 2903(d), 104 Stat. 1811 ..... 3, 68a

Statutes – Continued: Page

§ 2903(d)(2), 104 Stat. 1811 ..... 2, 68a
§ 2903(d)(2)(B), 104 Stat. 1811 ..... 2, 68a
§ 2903(e), 104 Stat. 1812 ..... 2-3, 69a
§ 2903(e)(2), 104 Stat. 1812 ..... 3, 69a
§ 2903(e)(3), 104 Stat. 1812 ..... 3, 69a
§ 2904(a), 104 Stat. 1813 ..... 3, 70a
§ 2904(b), 104 Stat. 1813 ..... 3, 71a
§ 2905(c)(1), 104 Stat. 1815 ..... 4, 71a
§ 2905(c)(2), 104 Stat. 1815 ..... 4, 71a
§ 2905(c)(3), 104 Stat. 1815 ..... 4, 71a
§ 2905(d), 104 Stat. 1815 ..... 4, 72a
§ 2908, 104 Stat. 1816 3

Miscellaneous:

56 Fed. Reg. 15,184 (1991) 4
137 Cong. Rec. (daily ed. July 30, 1991):
p. H6006 4
pp. H6008-6010 4
pp. H6010-6011 4
p. H6061 4
p. H6039 4
H.R. Rep. No. 665, 101st Cong., 2d Sess. (1990) .. 3

In the Supreme Court of the United States

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No.

SEAN O'KEEFE, ACTING SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

ARLEN SPECTER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Secretary of Defense, the Secretary of the Navy, the Defense Base Closure and Realignment Commission, and the Chairman and members of the Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-51a) is not yet reported. The opinion of the district court (App., *infra,* 54a-60a) is reported at 777 F. Supp. 1226.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1992. A petition for rehearing was denied on May 20, 1992. App., *infra,* 52a. On August 3, 1992,

Justice Souter extended the time for filing a petition for a writ of certiorari to and including September 17, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808, and the Administrative Procedure Act, 5 U.S.C. 704 (§ 10(c)), are reproduced at App., *infra*, 61a-73a.

STATEMENT

1. a. The Defense Base Closure and Realignment Act of 1990 (Act), Pub. L. No. 101-510, 104 Stat. 1808, establishes a mechanism for identifying and closing unnecessary domestic military bases. The Act provides for three rounds of base closures, in 1991, 1993 and 1995. § 2903(c)(1), 104 Stat. 1811. The Act establishes a Defense Base Closure and Realignment Commission. § 2902(a) and (e), 104 Stat. 1808. The Act requires the Secretary of Defense to provide the Commission with a force structure plan and a set of criteria for identifying bases for closure or realignment. § 2903(a)(1) and (2), 104 Stat. 1810. The Secretary, applying the criteria and the force structure plan, must recommend bases for closure and realignment. § 2903(c)(1), 104 Stat. 1811.

The Act charges the Commission with reviewing the Secretary's recommendations and preparing a report for the President containing its assessment of the Secretary's proposals and its own recommendations for base closures. § 2903(d)(2), 104 Stat. 1811. The Commission may change any of the Secretary's recommendations if they "deviate[ ] substantially" from the force structure plan and criteria. § 2903(d)(2)(B), 104 Stat. 1811.

The Act provides for the Commission's recommendations to be presented to the President. § 2903(e), 104 Stat.

1812. The President may approve or disapprove the Commission's recommendations in whole or in part, and must transmit his determination to the Commission and Congress. § 2903(e)(2) and (3), 104 Stat. 1812. If the President disapproves the recommendations, the Commission must prepare new recommendations and resubmit them to the President. § 2903(e)(3), 104 Stat. 1812. If the President approves the recommendations, the Act provides for Congress to review the President's decision by considering a joint resolution of disapproval. §§ 2904(b), 2908, 104 Stat. 1813, 1816. If a joint resolution of disapproval is enacted after presentment to the President, the Secretary of Defense may not close the bases approved for closure by the President. § 2904(b), 104 Stat. 1813. Conversely, if a joint resolution of disapproval is not enacted, the Secretary is required to close the bases. § 2904(a), 104 Stat. 1813.

The Act places strict time limits on each step in this process, based on Congress's recognition that "[e]xpedited procedures * * * are essential to make the base closure process work." H.R. Rep. No. 665, 101st Cong., 2d Sess. 384 (1990). In each of the Act's three biennial rounds, the Secretary of Defense is required to submit his closure recommendations to the Commission by April 15. § 2903(c), 104 Stat. 1811. The Commission is then required to complete its deliberations and submit its final report to the President by July 1. § 2903(d), 104 Stat. 1811. The President, in turn, is required to make his decision within two weeks, by July 15. § 2903(e), 104 Stat. 1812. Finally, the Act allows Congress 45 legislative days in which to disapprove the President's decision, under streamlined procedures that eliminate ordinary legislative delays. §§ 2904(b), 2908, 104 Stat. 1813, 1816.

The Act authorizes the Secretary of Defense to close or realign military installations "without regard to" earlier statutory restrictions on domestic base closings.

§ 2905(d), 104 Stat. 1815. And the Act specifically provides that "[t]he provisions of the National Environmental Policy Act of 1969 * * * shall not apply to the actions of the President, the Commission, and * * * the Department of Defense in carrying out [the Act]." § 2905(c)(1), 104 Stat. 1815. The Act authorizes a narrow class of NEPA suits challenging actions to implement the base closure decisions, but it prohibits NEPA challenges to the closure decisions themselves. § 2905(c)(2) and (3), 104 Stat. 1815.

b. In April 1991, the Secretary of Defense presented the Commission with a list of 72 domestic military installations recommended for closure or realignment. See 56 Fed. Reg. 15,184 (1991). Among the installations selected by the Secretary was the Philadelphia Naval Shipyard. After analyzing the Secretary's recommendations and taking public testimony, including testimony from virtually all the respondents, the Commission unanimously concurred with the Secretary's recommendation that the Shipyard be closed. The Commission forwarded its recommendations, which covered the Shipyard and 81 other military installations, to the President. See App., *infra*, 7a.

On July 10, 1991, the President approved the recommendations of the Commission. On July 30, 1991, the House of Representatives entertained a proposed resolution of disapproval. 137 Cong. Rec. H6006 (daily ed.). Much of the ensuing floor debate was devoted to allegations, presented by several of the respondents, that the procedures by which the Philadelphia Shipyard was recommended for closure were invalid. See, *e.g.*, *id.* at H6008-H6010 (Rep. Weldon); *id.* at H6010-H6011 (Rep. Foglietta); *id.* at H6021 (Rep. Andrews). After hearing these objections, the House rejected the proposed resolution by a vote of 364 to 60 (*id.* at H6039).

2. This action was filed on July 8, 1991, three weeks before the House acted on the proposed resolution of disapproval. The plaintiffs, respondents here, are members

of Congress from Pennsylvania and New Jersey; the States of Pennsylvania, New Jersey, and Delaware, and officials of those States; the City of Philadelphia; and local labor unions and union officials. The defendants, petitioners here, are the Secretary of Defense, the Secretary of the Navy, the Commission, and the Commission's chairman and members. See App., *infra*, 8a.

Respondents contended that petitioners had failed to comply with various procedural requirements allegedly imposed by the Act. C.A. App. 12-70; App., *infra*, 9a.[1] Respondents asked the district court to enjoin the closure of the Shipyard and, more broadly, to enjoin the Department of Defense "from taking any action based upon the list of closure and realignment proposals submitted by the Secretary of the Navy." C.A. App. 61, 65, 68.

In October 1991, the district court dismissed the suit in its entirety. App., *infra*, 54a-60a. The district court held that judicial review of respondents' claims is implicitly precluded by the Act itself. *Id.* at 54a-57a. In the alternative, the district court held that judicial review is barred by the political question doctrine. *Id.* at 57a-59a.

3. The court of appeals affirmed in part and reversed in part. App., *infra*, 1a-51a. As an initial matter, the court of appeals considered whether the actions at issue in this case constitute "final agency action" within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. 704. The court noted that "at least in one sense, we are here asked to review a presidential decision," since the Secretary of Defense and the Commission merely provide recommendations to the President and since "the plaintiffs

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[1] In addition to their statutory claims, some of the respondents raised a claim under the Due Process Clause. The due process claim was rejected on the merits by the court of appeals. See App., *infra*, 38a-40a.

necessarily seek relief" from the President's decision. App., *infra,* 15a. The court acknowledged that the APA "may not be applicable to presidential decisionmaking" because the President might not constitute an "agency" under the APA. App., *infra,* 16a. But the court concluded that even if the APA is inapplicable, "its provisions concerning judicial review represent a codification of the common law," and actions of the President are not immune from judicial review as a matter of common law. *Ibid.* The court therefore concluded that judicial review, if not otherwise precluded, is available regardless of whether the APA applies to the President. App., *infra* 17a.

The court then held that the 1990 Act bars judicial review of some, but not all, claims arising under the Act. App., *infra,* 17a-34a. Relying chiefly on 5 U.S.C. 701(a)(2), which bars judicial review of agency actions "committed to agency discretion by law," the court held that judicial review is precluded to the extent that it touches on the merits of the base closure decision. App., *infra,* 18a-19a. But the court also held that judicial review is available to ensure compliance with the procedural requirements of the Act. App., *infra,* 19a-27a. Applying this distinction, the court reinstated several claims against the Secretary of Defense and the Commission, while affirming the district court's dismissal of the remaining claims. App., *infra,* 27a-34a. The court further held that the political question doctrine did not bar judicial review of the reinstated claims. App., *infra,* 34a-38a.

The court declined to decide what relief, if any, would be available if a procedural violation of the Act were ultimately found. App., *infra,* 26a-27a & n.13. The court suggested, however, that the appropriate form of relief would be to "requir[e] further process in accordance with the provisions of the Act * * * on an expedited basis." App.,

infra, 27a n.13. If this "further process" led the Commission to change its recommendations, the court concluded that "reconsideration of the entire list of recommendations by the President and Congress * * * might be both feasible and appropriate." *Ibid.*

Judge Alito concurred in part and dissented in part. He concluded that the Act precludes judicial review of all of respondents' statutory claims, including the claims reinstated by the court. App., *infra*, 40a-51a. Judge Alito reasoned that judicial review would fatally interfere with the overriding statutory goals of speed and finality, and would threaten the statutory objective of creating a single package of base closures to be approved or disapproved *en bloc*. App., *infra*, 44a-49a. Judge Alito also noted that "it could be argued that the defendants' actions did not constitute 'final agency action' under 5 U.S.C. § 704," but he found it unnecessary to decide that issue in light of his conclusions about the Act's preclusion of review. App., *infra*, 41a n.2.

The court of appeals denied the government's petition for rehearing and suggestion of rehearing *en banc* on May 20, 1992. App., *infra*, 52a-53a.

REASONS FOR GRANTING THE PETITION

The Defense Base Closure and Realignment Act of 1990 establishes a process for identifying and closing unneeded domestic military bases. Base closures and realignments are essential to the restructuring of the Nation's military forces following the end of the Cold War. The decision of the court of appeals threatens to frustrate that important national goal by allowing precisely the kind of delaying tactics that prevented base closures prior to the Act.

Although the court of appeals' decision poses a serious threat to the base closure process established by Congress,

we do not believe that plenary review is necessary at this stage of the proceedings. After the court of appeals issued its decision in this case and denied the government's petition for rehearing, this Court issued its decision in *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992). *Franklin* strongly suggests that there is no "final agency action" in this case subject to judicial review under the APA, 5 U.S.C. 704. In addition, *Franklin* undermines the court of appeals' assumption that, as a matter of common law, actions of the President are subject to judicial review to the same extent that agency actions are subject to review under the APA. The court of appeals has not yet had an opportunity to reconsider its decision in light of *Franklin*. Accordingly, we believe that it is appropriate to vacate the court of appeals' decision and remand the case for further consideration in light of *Franklin*.

In *Franklin*, this Court held that there is no basis for an APA challenge to the decennial reapportionment of the House of Representatives because none of the actions at issue in that case constituted "final agency action." Under the applicable census statutes, the Secretary of Commerce submitted a census report to the President, who in turn determined the number of Representatives due each State and reported his decision to Congress. The Court held that the actions of the Secretary were not "final" agency actions, while the actions of the President were not subject to review because the President is not an "agency." *Franklin*, 112 S. Ct. at 2773-2776.

With respect to the actions of the Secretary of Commerce, the Court explained that the "core question" in deciding whether an agency action is "final" is "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." 112 S. Ct. at 2773. Under the census

statutes, "the action that * * * has a direct effect on the reapportionment is the President's statement to Congress, not the Secretary's report to the President," because nothing barred the President from directing the Secretary to change the census. *Ibid.* "Because the Secretary's report to the President carries no direct consequences," the Court concluded, "it serves more like a tentative recommendation than a final and binding determination," and hence "[is] not final and therefore not subject to review." *Id.* at 2774.

In addition, the Court in *Franklin* declined to extend the APA's definition of "agency" to the President, "[o]ut of respect for the separation of powers and the unique constitutional position of the President." 112 S. Ct. at 2775. Because "the APA does not expressly allow review of the President's actions," the Court "presume[d] that his actions are not subject to its requirements." *Id.* at 2775-2776. The Court acknowledged that "the President's actions may still be reviewed for constitutionality," but held that his actions nonetheless are not subject to judicial review "under the standards of the APA." *Id.* at 2776.

Franklin makes clear that there is no "final agency action" subject to review under the APA in this case. The base closure report of the Commission, like the census report of the Secretary, is not binding on the President. The Commission's report has no "direct consequences," *Franklin,* 112 S. Ct. at 2774, because it takes effect only if the President accepts it and Congress does not disapprove it. See pp. 2-3, *supra.* Thus the Commission's report, and the steps taken by the Commission leading up to the report, do not constitute "final" agency action under *Franklin.* The same conclusion applies *a fortiori* to the actions of the Secretary of Defense, who plays an even more preliminary role in the base closure process. See p. 2, *supra.* And the actions of the President here, like those in

Franklin, are not subject to judicial review under the APA because the President is not an "agency."

The court of appeals' resolution of the "final agency action" issue cannot be squared with *Franklin*. First, the court of appeals failed to explain how the actions of the Secretary of Defense and the Commission under the Act could be regarded as "final." Second, although the court of appeals assumed that the President was not subject to suit as an "agency" under the APA, the court nonetheless allowed respondents to challenge his actions on the basis of supposed "common law" principles. See App., *infra*, 16a-17a. But *Franklin* makes clear that there is no general "common law" basis for challenging the President's exercise of his statutory authority. The only kind of non-APA review recognized in *Franklin* is a suit challenging the *constitutionality* of Presidential actions, see *Franklin*, 112 S. Ct. at 2776, and constitutionality is not an issue in this case.[2] *Franklin's* concern for "the separation of powers and the unique constitutional position of the President," 112 S. Ct. 2775, would be rendered meaningless if plaintiffs could perform an end run around the APA simply by characterizing their suit as a "common law" action.[3]

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[2] As noted above (see note 1, *supra*), respondents raised a due process claim in their complaint, but the court of appeals rejected the claim on the merits.

[3] In our view, the court of appeals also erred in concluding that the 1990 Act does not preclude judicial review of "procedural" claims. An essential feature of the base closure mechanism created by the Act is the requirement of a single, indivisible "package" of base closures. See App., *infra*, 48a-49a (Alito, J., concurring in part and dissenting in part). The court of appeals' decision allows private parties—and individual legislators who fail to accomplish their goals through the legislative process—to attempt to remove individual bases from the package through litigation. See App., *infra*, 50a (Alito, J., concurring in part and dissenting in part). The court of appeals' decision also

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the cause remanded for further consideration in light of *Franklin* v. *Massachusetts*, 112 S. Ct. 2767.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

ROBERT A. LONG, JR.
Assistant to the Solicitor General

DOUGLAS N. LETTER
SCOTT R. McINTOSH
Attorneys

SEPTEMBER 1992

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jeopardizes the Act's insistence on expedition and finality. See App., *infra*, 44a-46a (Alito, J., concurring in part and dissenting in part). And the court's handling of the preclusion issue will lead to grave remedial problems. As explained above, however, this Court's decision in *Franklin* v. *Massachusetts*, *supra*, may well require reversal of the court of appeals' judgment without reaching these other issues. Accordingly, we do not seek plenary review of these issues at this time.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 91-1932

SEN. ARLEN SPECTER; SEN. HARRIS WOFFORD; SEN. BILL BRADLEY; SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY; COMMONWEALTH OF PENNSYLVANIA; ERNEST D. PREATE, JR., PENNSYLVANIA ATTORNEY GENERAL; REP. CURT WELDON, REP. THOMAS FOGLIETTA; REP. ROBERT ANDREWS; REP. R. LAWRENCE COUGHLIN; CITY OF PHILADELPHIA; HOWARD J. LANDRY; INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL; METAL TRADES COUNCIL, LOCAL 687 MACHINISTS; GOVERNOR JAMES J. FLORIO; STATE OF NEW JERSEY; ROBERT J. DEL TUFO, NEW JERSEY ATTORNEY GENERAL; GOVERNOR MICHAEL N. CASTLE; STATE OF DELAWARE; REP. PETER H. KOSTMEYER; REP. ROBERT A. BORSKI, RONALD WARRINGTON; PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION LOCAL NO. 2

v.

H. LAWRENCE GARRETT, III, SECRETARY OF THE NAVY; RICHARD CHENEY, SECRETARY OF DEFENSE; THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION, AND ITS MEMBERS; JAMES A. COURTER; WILLIAM L. BALL, III; HOWARD H. CALLAWAY; DUANE H. CASSIDY; ARTHUR LEVITT, JR.; JAMES C. SMITH, II; ROBERT D. STUART, JR.,

U.S. SEN. ARLEN SPECTER, U.S. SEN. HARRIS WOFFORD, U.S. SEN. BILL BRADLEY, U.S. SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY, THE COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., GOVERNOR JAMES J. FLORIO, THE STATE OF NEW JERSEY, NEW JERSEY ATTORNEY GENERAL ROBERT J. DEL TUFO, GOVERNOR MICHAEL N. CASTLE; THE

STATE OF DELAWARE, U.S. REP. CURT WELDON, U.S. REP. THOMAS FOGLIETTA, U.S. REP. ROBERT E. ANDREWS, U.S. REP. R. LAWRENCE COUGHLIN, U.S. REP. PETER H. KOSTMAYER, U.S. REP. ROBERT A. BORSKI, THE CITY OF PHILADELPHIA, HOWARD J. LANDRY, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL, METALS TRADES COUNCIL, LOCAL 687, MACHINISTS, RONALD WARRINGTON; THE PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION, LOCAL NO. 2, APPELLANTS

Filed April 17, 1992

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 91-4322)

Argued January 28, 1992

Before: STAPLETON, SCIRICA and ALITO, *Circuit Judges*

(Opinion Filed April 17, 1992)

OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

I.

This is an action to enjoin the Secretary of Defense from carrying out a decision to close the Philadelphia Naval Shipyard ("Shipyard"). The plaintiffs-appellants ("plaintiffs") are Shipyard workers; their unions; members of Congress from Pennsylvania and New Jersey; the States of Pennsylvania, New Jersey, and Delaware, and officials of those States; and the City of Philadelphia. The defendants-appellees ("defendants") are the Secretary of Defense, the Secretary of the Navy, and the independent Defense

Base Closure and Realignment Commission ("Commission") and its members.

The Defense Base Closure and Realignment Act of 1990 ("the Act") is the latest in a series of statutes enacted by Congress during the past fifteen years to regulate the process by which domestic military bases are closed and realigned. In 1977, Congress passed legislation allowing the Secretary of Defense to close a particular base only after (1) notifying the Committees on Armed Services of the Senate and House of Representatives of the bases selected for closure; (2) submitting to these Committees an evaluation of the various consequences of the closure (including the local economic, environmental, budgetary and strategic consequences); and (3) deferring action for at least sixty days, during which time Congress could act legislatively to halt the closure or realignment. 10 U.S.C. § 2687(b) (Supp. IV 1980). The statute also required the Secretary to comply with the requirements of the National Environmental Policy Act of 1969 ("NEPA"). *Id.*

Eleven years later, Congress enacted the Base Closure and Realignment Act of 1988, the immediate predecessor of the 1990 Act. Pub. L. No. 100-526, §§ 201-209, 102 Stat. 2623, 2627-34 (1988). Under the 1988 Act, the Secretary of Defense could no longer unilaterally choose bases for closure. Instead, that Act vested a new independent commission with the power to recommend bases for closure. *Id.* §§ 201(1), 203(b)(1-2), 102 Stat. at 2627-28. These recommendations were to be presented to the Secretary of Defense for approval or disapproval in their entirety. *Id.* §§ 201(1), 202(a)(1), 102 Stat. at 2627. If the Secretary approved the recommendations, the 1988 Act gave Congress 45 days within which to disapprove them. *Id.* § 202(b), 102 Stat. at 2627. The 1988 Act explicitly exempted the base closure decisions of the Commission and the Secretary from the requirements of NEPA. *Id.*

§ 204(c)(1), 102 Stat. at 2630. The legislative history of the 1988 Act indicates that Congress dropped the NEPA requirements in an effort to avoid delays.[1]

The 1988 Act was not a permanent mechanism for closing and realigning military installations, but was rather a one-time exception to the process set forth in the 1977 legislation. In January 1990, in actions governed only by the 1977 Act, the Secretary of Defense proposed another round of closures. Members of Congress voiced concern about the Secretary's decisionmaking having "raised suspicions about the integrity of the base closure selection process." H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705 (1990) ("House Conference Report"), *reprinted in* 1990 U.S.C.C.A.N. 3110, 3257. Moreover, House conferees later noted that base closures and realignments under the 1977 legislation took "a considerable period of time and involve[d] numerous opportunities for challenges in court." House Conference Report at 705, 1990 U.S.C.C.A.N. at 3257.

Congress subsequently enacted the Defense Base Closure and Realignment Act of 1990. Section 2901 of this Act declares that the law's purpose "is to provide a fair process that will result in the timely closure and realignment of military installations inside the United States." Pub. L. No. 101-510, § 2901(b), 104 Stat. 1808 (1990).[2] The Act, which governs three rounds of base closures (in

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[1] *See* H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3395, 3403 ("[t]he conferees recognize that [NEPA] has been used in some cases to delay and ultimately frustrate base closures, and support the narrowing of its applicability for closures and realignments under this act. However, they also believe that the NEPA goals of public disclosure and clear identification of potential adverse impacts . . . should be protected").

[2] In the interest of brevity, citations to the Act will hereinafter be limited to the section number only.

1991, 1993, and 1995), retains the basic features of the 1988 Act. An independent Commission, to be appointed by the President with the advice and consent of the Senate, is to meet in each of the three years. § 2902(a), (e). The Secretary of Defense must provide Congress and the Commission with a six-year "force structure plan" that assesses national security threats and the force structure needed to meet them. § 2903(a)(1)-(2). The Act also requires the Secretary to formulate criteria for use in identifying bases for closure or realignment; these criteria must be published in the Federal Register for public notice and comment, and they must be presented to Congress which evaluates and may disapprove them. § 2903(b).

For the first round of base closures, the Act requires the Secretary to recommend base closures and realignments by April 15, 1991, based on the force structure plan and final criteria. § 2903(c)(1). The Commission is then charged with reviewing these recommendations and with the preparation of a report for the President containing its assessment of the Secretary's proposals and its own recommendations for base closures. § 2903(d)(2). The Act requires the Commission to hold public hearings on the Secretary's recommendations, § 2903(d)(1), and authorizes the Commission to change any of the Secretary's recommendations if they "deviate[ ] substantially" from the force structure plan and the final criteria. § 2903(d)(2)(B). In its report to the President, the Commission must justify any departure from the Secretary's list of recommendations. § 2903(d)(3). The Commission is to be assisted in its task by the General Accounting Office ("GAO"), to which the Secretary must give all information used in making his initial recommendations, § 2903(c)(4), and which must report on the Secretary's recommendations to Congress and the Commission, § 2903(d)(5).

Once the Commission has made its recommendations, the Act requires that they be presented to the President for his review. § 2903(e). The President may approve or disapprove the Commission's recommendations in whole or in part, and must transmit his determination to the Commission and Congress. § 2903(e)(2)-(3). If the President approves the Commission's recommendations, Congress has 45 days from the date of this approval to pass a joint resolution disapproving of the Commission's recommendations in their entirety. §§ 2904(b), 2908. If such a resolution is enacted, the Secretary of Defense may not close the bases approved for closure by the President. § 2904(b). If the President disapproves the Commission's recommendations in whole or in part, he returns them to the Commission. The Commission reconsiders its recommendation in light of the President's actions and resubmits a revised list for the President's consideration. § 2903(e)(3). If the President does not transmit to Congress an approved list of recommendations by September 1 of any year in which the Commission has transmitted recommendations to the President, the base closure process for that year is terminated. § 2903(e)(5).

The Act contains several important provisions which were absent from predecessor base closure statutes, including, *inter alia*, the requirement that the Commission hold public hearings on the Secretary of Defense's closure recommendations, § 2903(d)(1); the requirement that all meetings of the Commission be open to the public, except where classified information is being discussed, § 2902(e)(2)(A); the requirement that a force structure plan be prepared, § 2903(a); the requirement that final criteria be developed, published and submitted for congressional consideration, § 2903(b)-(c); the requirement that the Secretary consider all military installations "equally without regard to whether or not the installation has been pre-

viously considered or proposed for realignment," § 2903 (c)(3); and the requirement that the Secretary transmit to the Comptroller General "all information used by the Department in making its recommendations to the Commission for closures and realignments" so that the GAO can analyze the Secretary's recommendations and aid the Commission in its deliberations, §§ 2903(c)(4), 2903(d)(5)(A)-(B).

In April 1991, the Secretary of Defense recommended the closure or realignment of a long list of domestic bases including twelve naval facilities. *See* 56 Fed. Reg. 15184 (April 15, 1991). Among the naval facilities recommended for closure was the Shipyard. The Commission subsequently held public hearings in Washington, D.C., and Philadelphia. During these hearings the Commission heard testimony from Department of Defense officials, legislators, and other experts. The Commissioners visited the major facilities recommended for closure, including the Shipyard. The GAO forwarded to the Commission a report on the Secretary's recommendations and assisted the Commission in its analysis of the Secretary's recommendations.

The Commission ultimately recommended that two of the naval facilities that the Secretary recommended for closure remain open, but concurred with the Secretary's recommendation that the Shipyard be closed. In all, the Commission recommended to the President that 34 installations be closed and 48 realigned. 1991 Defense Base Closure and Realignment Report to the President at vii-viii. President Bush approved all of the recommendations of the Commission, including the closure of the Shipyard. Following the President's approval, the House and Senate Armed Services Committees held hearings on the Commission's recommendations. On July 30, 1991, the House rejected a proposed resolution of disapproval of the Com-

mission's recommendations by a vote of 364-60, thus authorizing the Secretary to proceed with the closures and realignments. 137 Cong. Rec. H6006 (daily ed. July 30, 1991).

Plaintiffs[3] filed their original complaint in the district court on July 8, 1991, and an amended complaint on July 19, 1991.[4] In the amended complaint, plaintiffs allege that defendants[5] violated various provisions of the Act.

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[3] Plaintiffs include United States Senators Arlen Specter and Harris Wofford of Pennsylvania, Bill Bradley and Frank R. Lautenberg of New Jersey; Governors Robert P. Casey of Pennsylvania, James J. Florio of New Jersey, and Michael N. Castle of Delaware; Attorneys General Ernest D. Preate, Jr. of Pennsylvania, and Robert J. Del Tufo of New Jersey; United States Representatives Robert E. Andrews, R. Lawrence Coughlin, Peter H. Kostmayer, and Robert A. Borski; the City of Philadelphia; the International Federation of Professional and Technical Engineers, Local 3, and its President Howard J. Landry; the Metal Trades Council, Local 687 Machinists, and its President William F. Reil; and the Planners Estimators Progressman & Schedulers Union, Local No. 2, and its President Ronald Warrington.

[4] Plaintiffs filed their original complaint before President Bush approved the Commission's recommendations. As we shall see, judicial review is not available at this preliminary stage; nevertheless, because the President made his decision while this suit was pending, we are not presented with a jurisdictional defect. "[I]n this Court, a 'premature appeal taken from an order which is *not final* but which is followed by an order that *is final* may be regarded as an appeal from the final order in the absence of a showing of prejudice to the other party.' *Richerson v. Jones*, 551 F.2d 918, 922 (3d Cir. 1977) (emphasis in original)." *Westinghouse Elec. Corp. v. United States*, 598 F.2d 759, 766 n.22 (3d Cir. 1979) (noting that court retained jurisdiction where appeal was filed subsequent to preliminary order of Nuclear Regulatory Commission, but before issuance of final NRC order). *See also Dowling v. City of Philadelphia*, 855 F.2d 136, 138 (3d Cir. 1988) (distinguishing situation where notice of appeal is premature under FRAP 4(a)(4)).

[5] Defendants include the Secretary of the Navy, H. Lawrence Garrett, III; the Secretary of Defense, Richard Cheney; the Defense Base Closure and Realignment Commission and its members James A.

To summarize briefly the allegations: In Count I plaintiffs allege that the Secretaries of Defense and the Navy violated the Act by withholding information pertinent to the decisionmaking process, by failing to apply the final criteria and force structure plan evenhandedly to all installations, and by failing to implement record-keeping and internal controls. In Count II, plaintiffs charge the Commission with violating the Act by basing its decisions on information supplied by the Navy but not made available to the GAO, Congress or the public, by failing to apply the final criteria and force structure plan evenhandedly, and by ignoring the conclusions of the GAO. Finally in Count III, the Shipyard employee and union plaintiffs charge all defendants with violating their due process rights under the Fifth Amendment to the Federal Constitution by disregarding the procedures set forth in the Act in deciding to close the Shipyard.

Plaintiffs filed motions for a preliminary injunction and expedited discovery in July. On August 16, defendants filed a motion to dismiss. After a hearing on October 25, 1991, the district court issued its order dismissing the complaint with prejudice on November 1, 1991. The district court found that the legislative history of the Act, as well as the law's purpose to provide for timely closure of military bases, indicate a clear legislative intent to preclude judicial review. *Specter v. Garrett,* No. 91-4322, slip op. at 1-4 (E.D. Pa. November 1, 1991). As an alternative ground for its holding, the court held that this case is one which is "impossible for the court to resolve independently without expressing lack of respect due the coordinate branches of government," *id.* at 5, and as a result presents

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Courter, William L. Ball, III, Howard H. Callaway, Duane H. Cassidy, Arthur Levitt, Jr., James C. Smith, II, and Robert D. Stuart, Jr.

a nonjusticiable political question. *Id.* at 4-7.[6] Plaintiffs timely filed a notice of appeal.

II.

The threshold issue in this appeal is one of standing. Defendants assert that none of the plaintiffs have standing to litigate the issues raised in the complaint. Because the position of each of the plaintiffs is the same and because we conclude that the Shipyard employees and their union have standing, we need not address the standing of the remaining plaintiffs. *See, e.g., City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478, 485 (D.C. Cir. 1990).

A person who seeks standing to challenge agency action must show (1) injury in fact and (2) that his interests are arguably within the zone of interests intended to be protected by the statute or constitutional provisions on which the claim is based. *Association of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 152-53 (1970). A showing of injury in fact is required by the constitutional limitation of federal court jurisdiction to actual cases or controversies. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). The injury must be concrete and one which can be addressed by the court should the plaintiff prevail on the merits. *Id.* at 37-38. This test is intended to ensure that complainants have a "personal stake" in the outcome of the proceedings. *Id.*

There can be no doubt that Shipyard employees have a personal stake in these proceedings. If the shipyard is closed, their jobs will be lost. If they prevail on their

[6] In addition to the two issues addressed by the district court, the appellees argued that none of the appellants had standing to bring the suit, and that the unions' due process claim failed to state a valid constitutional claim. The district court did not reach these issues.

claim, it is within the power of the district court to grant effective relief. Thus, the Shipyard employees meet the injury in fact requirement.

To satisfy the zone of interests requirement, a plaintiff must "establish that the injury he complains of (*his* aggrievement, or the adverse effect *upor nim*) falls within the 'zone of interests' sought to be pro ected by the statutory provisoin whose violation forms the legal basis of his complaint." *Lujan v. National Wildlife Fed'n,* 497 U.S. __, 110 S. Ct. 3177, 3186 (1990) (emphasis in original). As explained by the Supreme Court,

> The "zone of interest" test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.

Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399-400 (1987) (footnote omitted). We must thus inquire whether employees of military bases were within the zone of interests meant to be protected by the Act. *See Air Courier Conference of Am. v. American Postal Workers Union,* 498 U.S. __, 111 S. Ct. 913, 918 (1991).

The legislative history of the Act demonstrates Congress' sensitivity to the impact of a base closing on the employees of the base and the community in which they live.

Because of this sensitivity, Congress sought to ensure that the interest of the employees and their communities would be heard and that the process would be perceived by them as fair. To further this objective, Congress provided for opportunities for public hearings and comment. *See, e.g.*, §§ 2903(d)(1) and 2903(b). It also provided that, if the national interest is found to outweigh those of the local community, economic assistance would be provided to assist in the period of transition. § 2905(a)(B). Finally, because of this congressional concern reflected in the Act and its legislative history, the base closing criteria established by the Secretary of Defense and left unaltered by the Congress include among the eight factors to be considered "the economic impact on communities." 56 Fed. Reg. 6374 (Feb. 15, 1991).

Given Congress' concern and the steps it took to assure consideration of the interests of employees and their communities, we readily conclude that individual Shipyard employees are within the zone of interest sought to be protected by the Act and that they have standing to press the issues raised in the complaint. We reach a similar conclusion with respect to the unions who are seeking to represent the interests of the members. *International Union, UAW v. Broch*, 477 U.S. 274 (1986).

III.

Section 702 of the Administrative Procedure Act ("APA") provides that any "person . . . aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof." 5 U.S.C. § 702. The APA stipulates that the reviewing court will "set aside agency action . . . found to be . . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law; . . . contrary to constitutional right

. . . ; [or] without observance of the procedure required by law." 5 U.S.C. § 706(2). Review under the APA is available, however, only "to the extent that . . . statutes [do not] preclude judicial review" and the "agency action is [not] committed to agency discretion by law." 5 U.S.C. § 701(a).

The defendants insist that the district court had no authority under the APA to conduct a review of the decision to close the Shipyard because the Act precludes judicial review. Litigants making such a contention have a very substantial burden to shoulder. As the Supreme Court stated in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-71 (1987) (emphasis added):

> We begin with the *strong presumption* that Congress intends judicial review of administrative action. From the beginning "our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive rason to believe that such was the purpose of Congress." [citations omitted]. In *Marbury v. Madison*, 1 Cranch 136, 163, 5 U.S. 137, 163, 2 L. Ed. 60 (1803), a case itself involving review of executive action, Chief Justice Marshall insisted that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws."
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> * * *
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> Committees of both Houses of Congress have endorsed this view. In undertaking the comprehensive rethinking of the place of administrative agencies in a regime of separate and divided powers that culminated in the passage of the [APA], the Senate Committee on the Judiciary remarked:
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> "*Very rarely* do statutes withhold judicial review. It has *never* been the policy of Congress to prevent the

> administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be *blank checks* drawn to the credit of some administrative officer or board." S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945).

Because "the very essence of civil liberty" is implicated, courts will presume the availability of judicial review unless there is "clear and convincing evidence of a contrary legislative intent." *Bowen*, 476 U.S. at 671, quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967). This "clear and convincing" standard is not meant in the strict evidentiary sense, but rather as "a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984).

The second category of agency action not subject to judicial review under the APA is that which is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This exception is, in essence, a subset of those cases where the statute passed by Congress precludes judicial review. That is, Congress in some instances evidences an intent that there be no judicial review by requiring an agency or official to make a decision in circumstances under which a reviewing court either would have no law to apply or would find itself confronted with judicially unmanageable issues. Because decisions "committed to agency discretion" are but one example of decisions with respect to which Congress has precluded judicial review, the strong presumption favoring such review applies here as well, and review is available unless it is clear that a reviewing court

could not conduct a meaningful review. *See Davis Enter. v. United States Envtl. Protection Agency*, 877 F.2d 1181, 1185 (3d Cir. 1989) (presumption of reviewability exists in cases interpreting § 701(a)(2) of APA), *cert. denied*, 493 U.S. 1070 (1990).

The availability of judicial review under the APA is thus a matter of congressional intent[7] and we must address the reviewability of each of the issues raised by plaintiffs with that fact in mind. Before turning to that task, however, there is one further preliminary matter to be noted. The actions challenged here are not "agency actions" as usually encountered under the APA. The decisionmaking contemplated by the Act is a joint undertaking. The President, exercising the authority which he here exercised, could not close a base that the Commission had not recommended for closure. On the other hand, the Secretary and the Commission can only make recommendations under the Act. If the President fails to approve the Commission's recommendations, the closure process comes to an end for that year. § 2903(e)(5). While the statutory and constitutional violations alleged here result from actions or omissions of the Commissioner and the Secretary of Defense prior to the making of their recommendations, the alleged injury to the plaintiffs did not occur but for a decision of the President and it is from that decision that the plaintiffs necessarily seek relief; it is the implementation of the President's decision that we have been asked to enjoin. Thus, at least in one sense, we are here asked to review a presidential decision.

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[7] It is true, of course, that Congress may limit executive discretion only insofar as it acts within its constitutional grants of enumerated authority. *See* U.S. Const. art. I, § 8 (enumerating the chief powers granted to Congress). Neither party here, however, claims that Congress has acted beyond that authority in drafting the terms of the Act.

While the issue remains an open one in this Circuit, the APA may not be applicable to presidential decisionmaking. The Court of Appeals for the District of Columbia Circuit held in *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991) that the APA does not apply to the President. In *Armstrong*, the court reasoned that, while the APA defines "agency" as an "authority of the government", 5 U.S.C. § 701(b)(1), Congress adopted this broad language to avoid a formalistic definition of the term and did not intend to subject the President to the APA's requirements. 924 F.2d at 289. The court also noted the longstanding practice of not requiring the President to abide by APA rulemaking procedures when issuing executive orders, and the rule that when Congress sets out to restrict presidential action, it must make its intentions clear. *Id.*

Even if the APA does not apply to decisions of the President, however, its provisions concerning judicial review represent a codification of the common law, 5 Kenneth C. Davis, *Administrative Law* § 28:4 (1984), *cited with approval in Heckler v. Cheney*, 470 U.S. 821, 832 (1985); *see also ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987) (APA "codifies the nature and attributes of judicial review"), and actions of the President have never been considered immune from judicial review solely because they were taken by the President. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *see also INS v. Chadha*, 462 U.S. 919, 953 n. 16 (1983) ("[e]xecutive action under legislatively delegated authority . . . is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review"); *Nixon v. Fitzgerald*, 457 U.S. 731, 781 (1982) (White, J., dissenting) ("it is the rule, not the exception, that executive actions—including those taken at the immediate direction of the

President—are subject to judicial review"). As explained hereafter, we view the decisionmaking assigned to the President by the Act as clearly committed to his discretion and unreviewable. Congress's intent in this regard is sufficiently clear that our review would be the same whether or not the presumption favoring judicial review under the APA is applicable to presidential decisionmaking. It follows that our conclusions with respect to the availability of judicial review in this case will be the same whether or not the APA applies to presidential decisionmaking.

A.

We think it can be said with confidence that Congress intended no judicial review of decisions under the Act prior to the effective date of the President's decision, i.e., the first date upon which the Secretary can carry out any closure or realignment under § 2904(b). We say this for two reasons. First, the statutory scheme is inconsistent with there being judicial review prior to this point. The Act sets a very stringent timetable for the various stages of the process it establishes and Congress clearly intended that the final decision on base closing and realignment be reached with alacrity. The Secretary is required to submit his list of recommendations to the Commission by April 15th. § 2903(c). The Commission is then required to submit its final report to the President by July 1st, ten weeks later. § 2903(d). The President, in turn, is required to make his decision within two weeks, by July 15, 1991. § 2903(e). Finally, the Act allows Congress 45 days in which to disapprove the President's decision. § 2904(b). As the Supreme Court has repeatedly noted, judicial review while an administrative process is on-going is disruptive even where there is no requirement of expedition.

See, e.g., Weinberger v. Salfi, 422 U.S. 749, 765 (1975) (premature judicial interference with agency processes may prevent agency from functioning efficiently). With a timetable like that established in the Act, the ability of the participants to meet their responsibilities would be seriously jeopardized if litigation were permitted to divert their attention. Second, Congress was undoubtedly aware of the rule that the courts may review agency action only if its impact upon plaintiffs is direct and immediate, *see Abbott Labs.*, 387 U.S. at 152. One can rarely if ever be injured by a base closing prior to a decision having been made to close that base. The actions of the Secretary and the Commission prior to the President's decision are merely preliminary in nature. *See State of Nevada v. Watkins*, 939 F.2d 710, 715 (9th Cir. 1991) (holding that Congress intended to preclude judicial review of "preliminary decisionmaking activity").

B.

One can also say with confidence that Congress intended no judicial review of the manner in which the President has exercised his discretion in selecting bases for closure; indeed, plaintiffs do not argue otherwise. Congress imposed no restrictions on the discretion of the Commander-in-Chief concerning the domestic deployment of the nation's military resources. The Act does not require of the President, as it does of the Secretary and Commission, that he accept the force structure plan and the base-closing criteria. *See* § 2903(e). If the President believes that the assessment of military need by the Secretary is understated or overstated, he can reject the recommendations for that reason. This leaves a court with no law to apply; i.e., the decision on which bases to close is committed by law to presidential discretion, and judicial review cannot be

available. *Cf. Chicago and Southern Airlines v. Waterman S.S. Co.*, 333 U.S. 103 (1948) (under federal statute, applications to engage in foreign air transportation must be approved by President after recommendation by Civil Aeronautics Board; before Presidential approval, no appealable final result exists, and Presidential decision itself is not reviewable because it is committed to his discretion).

C.

This does not end the matter, however. As this court has repeatedly stressed, judicial review is foreclosed only "*to the extent that* statutes preclude" such review and only "*to the extent that* agency action is committed to agency discretion by law." 5 U.S.C. § 701(a); *see, e.g., Kirby v. United States Govt. Dep't of Hous. and Urban Dev.*, 675 F.2d 60 (3d Cir. 1982); *Local 2855, AFGE v. United States*, 602 F.2d 574 (3d Cir. 1979). Thus, the fact that some aspects of a decisionmaking process are determined to be not subject to judicial review does not absolve the courts from the responsibility of determining whether a clear congressional intention to preclude review exists with respect to other aspects of that same process. There are a number of statutes, for example, in which Congress has clearly intended that there be no review of the ultimate exercise of the agency's discretion, but, at the same time, has anticipated judicial review of compliance with its procedural mandates concerning the process leading up to the ultimate discretionary decision. *See, e.g., Bowen*, 476 U.S. at 675-76 (Medicare statute explicitly limits review of benefit determinations, but challenges to method of determination are not so limited and therefore are reviewable); *Kirby*, 675 F.2d at 67-68 (under Housing Act of 1959, decision by Secretary of HUD to provide funding for housing project is unreviewable, but agency's compliance

with procedures in Act is subject to review). Accordingly, we must conduct an issue-specific analysis with congressional intent as our loadstar.

In this context, it is important to note that while Congress did not intend courts to second-guess the Commander-in-Chief, it did intend to establish exclusive means for closure of domestic bases. § 2909(a). With two exceptions,[5] Congress intended that domestic bases be closed *only* pursuant to an exercise of presidential discretion *informed by recommendations of the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base.* Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a specific procedure that would ensure balanced and informed advice to be considered by the President and by Congress before the executive and legislative judgments were made. We must keep this congressional objective in mind as we inquire whether and to what extent Congress intended decisions of the Secretary and Commission to be reviewable when someone aggrieved by a base closing alleges that those decisions and the process underlying them deviated from this congressional model.

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[5] The two other means by which bases may be closed are described in § 2909(c), which provides as follows, in relevant part:

> (c) *Exception.* – Nothing in this part affects the authority of the Secretary to carry out –
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> (1) closures and realignments under title II of Public Law 100-526 [the 1988 Act]; and
>
> (2) closures and realignments . . . carried out for reasons of national security or a military emergency . . .

D.

The defendants' primary argument is that Congress intended to preclude all judicial review of the base closure process other than the limited and here irrelevant review[9] expressly authorized by the Act. The defendants acknowledge that there is no express prohibition of judicial review under the Act. They correctly point out, however, that this does not end the inquiry. "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block*, 467 U.S. at 345. Defendants contend that the purpose of the Act, its structure and its legislative history are inconsistent with the existence of any judicial review other than in the narrow area expressly authorized. We disagree. While the defendants have pointed to plausible reasons why Congress might have decided to dispense with all judicial review not expressly authorized, nothing in the statute or its legislative history provides a basis for concluding with confidence that it actually decided to do so.

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[9] The Act does provide for limited review under NEPA, after the closure decisions have been made. *See* § 2905(c)(2). Specifically, NEPA applies to actions of the Secretary during the process of property disposal and during the process of relocating functions from one installation to another. To the extent it applies, NEPA requires any federal agency considering a "a major federal action significantly affecting the quality of the human environment" to prepare an Environmental Impact Statement identifying the environmental consequences of the proposed action and recommends ways to minimize those which are adverse. 42 U.S.C. § 4332(2)(c) (1988). Private parties may bring suit under the APA to challenge violations of NEPA's procedural requirements. *See Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 491-92 (9th Cir. 1987).

As we shall see, there are some areas of decisionmaking under the Act in which Congress did not intend the courts to engage in second-guessing. Whether one classifies those areas as "committed to agency discretion" or simply as areas in which Congress intended to preclude judicial review makes no difference; either way one looks at it, the character and context of the decision required by the Act reflects a clear legislative intention that there be no judicial review. On the other hand, there are other areas where our analysis leaves us with only the strong presumption favoring judicial review and no clear and convincing rebuttal. To hypothesize the paradigm case, if the Commission decided to dispense with public hearings in the interest of expedition, we could point to no clear and convincing evidence that Congress meant either to commit that decision to the Commission's discretion or otherwise to preclude judicial review of it.

Defendants purport to find a host of clear and convincing evidence of review preclusion in the Act and its legislative history. We will comment only on their three most plausible arguments: those pertaining to the timetable established by the Act, its express provision for limited NEPA review, and the cryptic legislative history concerning judicial review.

As we have noted, we agree with the proposition that the Act's timetable is inconsistent with judicial review prior to the final decision on which bases to close. However, we see little tension between that timetable and judicial review after a final list of bases for closure or realignment has been established. Judicial review at this stage will not interfere with the decisionmaking progress and holds no more potential for delay in implementing the final decision than exists in most of the broad range of situations in which Congress has countenanced judicial review. Moreover, the process for carrying out decisions

to close and realign bases is complicated and time-consuming, *see* § 2905 (governing implementation of the approved list), bases are not closed or realigned overnight. The process of judicial review has proved sufficiently flexible to accommodate governmental actions involving far greater exigency. Finally, we know from the legislative history that Congress was very sensitive to the impact that base closing and realignments have on the livelihood and security of millions of Americans and to the importance of public confidence in the integrity of the decisionmaking process. *See* H.R. Rep. No. 665, 101st Cong., 2d Sess. 385 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2931, 3078. In this context, accepting the brief delay occasioned by judicial review seems to us entirely consistent with the statutory scheme.

Defendants also contend that congressional intent to preclude judicial review, in particular review of procedural compliance with the Act, can be inferred from the Act's limitation of NEPA review. § 2905. Defendants point out that NEPA claims have been used to delay earlier base closures; they conclude that Congress expressed its intent to prevent procedural challenges in general by specifically excluding most of the new base closure process from compliance with NEPA. Plaintiffs look at the same facts and come to the opposite conclusion: By explicitly precluding only one kind of judicial review (NEPA), Congress intended all other kinds of review to be available. That two utterly inconsistent, yet plausible arguments may be fashioned from the same legislative expression is an example of why the Supreme Court has said, "[t]he existence of an express preclusion of judicial review in one section of a statute is a factor relevant to congressional intent, but it is not conclusive with respect to reviewability under other sections of the statute." *Morris v. Gressette,* 432 U.S. 491, 506 n.22 (1977). In short, we conclude that § 2905(c) does not con-

stitute clear evidence of congressional intent with respect to all judicial review under the Act.[10]

Finally, the defendants argue that an intent to preclude judicial review is discernable from the legislative history of the Act. In particular, they point to a paragraph in the House Conference Report which addresses the question of judicial review:

> The rulemaking (5 U.S.C. 553) and adjudication (5 U.S.C. 554) provisions of the Administrative Procedures Act (5 U.S.C. 551 et seq.) contain explicit exemptions for "the conduct of military or foreign affairs functions." An action falling within this exception, as the decision to close and realign bases surely does, is immune from the provisions of the [APA] dealing with hearings (5 U.S.C. 556) and final agency decisions (5 U.S.C. 557). Due to the military affairs exception to the [APA], no final agency action occurs in the case of various actions required under the base closure process contained in this bill. These actions, therefore, would not be subject to the rulemaking and adjudication requirements and would not be subject to judicial review. Specific actions which would not

[10] Although they did not do so, defendants might have argued that by allowing a very limited class of NEPA claims (§ 2905(c)(2) declares that NEPA "shall apply to actions of the Department of Defense . . . during the process of property disposal, and . . . during the process of relocating") but nowhere else allowing for judicial review, Congress expressed its intent to preclude all other forms of review. But we find this argument, too, ultimately unpersuasive. The mere failure to specify the availability of most forms of judicial review is not enough to overcome the strong presumption that this review may be had. *See State of Illinois Dep't of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983) ([n]othing much can be inferred from the fact that Congress did not specify a method for judicial review . . . , even though earlier [in the statute] it had specified such a method).

> be subject to judicial review include the issuance of a force structure plan under section 2903(a), the issuance of selection criteria under section 2803(b), [sic.] the Secretary of Defense's recommendation of closures and realignments of military installations under section 2803(d), [sic.] the decision of the President under section 2803(e), [sic.] and the Secretary's actions to carry out the recommendations of the Commission under sections 2904 and 2905.

House Conference Report at 705, 1990 U.S.C.C.A.N. at 3258. The district court concluded that "[t]his passage . . . expresses a clear congressional intent to preclude judicial review under the APA of all actions taken pursuant to the Base Closure Act." *Specter*, slip op. at 3. We disagree.

This passage is at best ambiguous. A fair reading reveals only an intent to preclude judicial review to the extent that there is not yet "final agency action" to review.[11] On its face, this paragraph does not claim that the Act itself forecloses any judicial review. Its only assertion is that the *APA* will preclude *some* judicial review and the only rationale given for the limited preclusions it contemplates under the APA is the absence of finality. The first three "specific actions" in the following list of illustrative actions that "would not be subject to judicial review" each lack finality and thus fit comfortably with the reading we

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[11] The reference in this passage to the APA's military affairs exception is especially mystifying. This exception to the general rulemaking and adjudication provisions in Chapter 5 of the APA, 5 U.S.C. §§ 553 and 554, gives agencies involved in military decisions discretion to determine how much public participation, if any, will be available before a final rule is issued, and what evidence will be heard (and by whom) during an agency hearing. The military affairs exception does not, however, determine whether a certain agency action is final within the meaning of Chapter 7 of the APA, 5 U.S.C. § 701 *et seq.*, which governs judicial review.

find most plausible. The reference to the last two unreviewable "specific actions," the President's action on the Commission's recommendation and the Secretary's action in carrying out the ultimate decisions, concededly do not fit as well. At some point both of these types of actions become final. Nevertheless, to the extent the inclusion of reference to these actions is significant at all,[12] they do not provide us with clear evidence that Congress intended to preclude all judicial review not expressly authorized. If Congress anticipated that these particular actions would not be reviewable, it is far more reasonable to attribute this to the fact that both types of actions are clearly committed by the Act to the discretion of the decisionmaker.

Because we find no clear evidence of a congressional intent to preclude all judicial review other than the limited NEPA review, we reject defendants' primary argument.

We recognize that our conclusion that judicial review is not altogether precluded means that there may be cases in which the challenged agency action will be found to fall short of or be inconsistent with the standards of the Act. We hasten to add that such a finding, if and when made, will not necessarily mandate judicial relief. Whether or not a violation receives a remedy is something that a court must determine through an exercise of discretion based on the character of the violation and all of the surrounding circumstances.[13] Thus, judicial review does not mean that

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[12] The inclusion of the Secretary's action under § 2905 as "not . . . subject to judicial review" provides further support for the theory that this paragraph reflects little more than imprecise staff work. The Secretary's actions under § 2905 are the only actions under the Act that are expressly made subject to judicial review.

[13] Accordingly, it is unwise to speculate about the appropriate form of a remedy without knowing the character of and circumstances surrounding the violation. We do not agree, however, that affording judicial relief would necessarily frustrate Congress's intent to have

any technical defalcation will invalidate the package and require that the process be repeated from square one.

E.

Having rejected the thesis that all judicial review is precluded, we now turn to the specific agency actions challenged by the plaintiffs and attempt to determine with respect to each allegation whether or not there is clear and convincing evidence of a congressional intent that there be no judicial review. Count I, it will be recalled, focuses on alleged deficiencies in the performances of the Secretaries of Navy and Defense.

The Secretary of Defense is required by the Act (a) to develop a force structure plan forecasting military need, (b) to identify criteria to be applied in determining which bases should and should not remain to meet that need, and (c) to formulate specific recommendations by applying that plan and those criteria to the current deployment of military resources throughout the country. § 2903(a)-(c). The Act makes no reference to the Secretary of the Navy and places no restrictions on the Secretary of Defense with respect to his sources of data or advice.

The plaintiffs challenge the decisionmaking process of the Secretary of Defense in fulfilling the above assign-

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presidential and congressional action only in the context of a "single package." As we shall see, any remedy afforded in this case would be limited to requiring further process in accordance with the provisions of the Act. Any such additional process could and should be afforded on an expedited basis. If the affording of that further process does not alter the recommendations of the Commission, reconsideration by the President or Congress might be unnecessary. If that further process would alter the Commission's recommendations, reconsideration of the entire list of recommendations by the President and Congress in accordance with the limited timetable of the Act might be both feasible and appropriate.

ments. They allege, *inter alia,* that his force structure plan "lacked sufficient detail"; that his specific recommendations were based on inadequate data; and that he had "decided" to close the Shipyard before developing the criteria and manipulated the criteria so as to justify that result, in violation of § 2903(c)(3) (requiring Secretary to consider all domestic installations "equally without regard to whether [they had] previously been considered for closure"). In addition, plaintiffs allege that the Secretary of Defense relied on advice and data from the Secretary of the Navy that was inadequate, insufficiently explained, and inadequately documented.

We do not think Congress intended for the courts to review this kind of challenge to action under the Act. We say this primarily for two reasons. First, the Secretary's recommendations are clearly committed to his discretion under the Act. While those recommendations are required to be based on the force structure plan and the base closing criteria and thus, in one sense, there are standards to be applied, the Secretary was assigned the task of formulating those standards because that task required military and other expertise.[14] So, too, do the tasks of applying those

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[14] The final criteria, for example, are reported in the Federal Register as follows:

> In selecting military installations for closure or realignment, the Department of Defense, giving priority consideration to military value (the first four criteria below), will consider:
>
> *Military Value*
>
> 1. The current and future mission requirements and the impact on operational readiness of the Department of Defense's total force.
>
> 2. The availability and condition of land, facilities and associated airspace at both the existing and potential receiving locations.
>
> 3. The ability to accommodate contingency, mobilization, and future total force requirements at both the existing and

standards to the circumstances of each installation and of establishing priorities among them. Review of the Secretary's performance of these tasks would necessarily present issues that simply are not "judicially manageable." In comparable circumstances, courts have concluded, based on the unmanageable nature of the issues that would be presented, that Congress anticipated no judicial review. *See Heckler,* 470 U.S. at 830 ("if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.' ").

In *National Federation of Federal Employees v. United States,* 905 F.2d 400, 405-406 (D.C. Cir. 1990) ("*NFFE*"), the Court of Appeals for the District of Columbia was asked to review the decisions of the Commission and the Secretary to close domestic military bases under the 1988 Base Closure Act, the predecessor of the 1990 Act which involved no presidential action. The court concluded that Congress intended no judicial review and we find ourselves in agreement with its reasoning:

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potential receiving locations.

4. The cost and manpower implications.

Return on Investment

5. The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs.

Impacts

6. The economic impact on communities.

7. The ability of both the existing and potential receiving communities' infrastructure to support forces, missions and personnel.

8. The environmental impact.

56 Fed. Reg. 6344 (Feb. 15, 1991).

> [T]he problem is not that the Act is devoid of criteria; . . . [the Act] sets forth nine specific criteria to be considered in making base closing decisions. Rather the rub is that the subject matter of those criteria is not "judicially manageable.". . . [J]udicial review of the decisions of the Secretary and the Commission would necessarily involve second-guessing the Secretary's assessment of the nation's military force structure and the military value of the bases within that structure. We think the federal judiciary is ill-equipped to conduct reviews of the nation's military policy. Such decisions are better left to those more expert in issues of defense.

The second, related ground for our conclusion that Congress contemplated no judicial review of these kinds of decisions, is Congress' provision of alternative methods of review. Congress anticipated that questions would be raised about the adequacy of the Secretary's data and analysis. It decided to put these questions to rest and guarantee the integrity of the process not through judicial review, but through review by two bodies far more suited to the task: the Commission, and the GAO. These two entities are charged with the assessment of the Secretary's application of the criteria and the force structure plan. Given the nature of this task, it seems clear to us that an additional review by the courts would not contribute to public confidence in this part of the process and accordingly, we doubt that Congress intended an additional level of review.

One further comment is in order in connection with this category of issues. Plaintiffs argue that it takes no military expertise to make a finding of historic fact as to whether the Secretary prejudged the relevant issue by deciding to close the Shipyard prior to establishing the criteria. We

conclude that this is an oversimplification. When Congress called upon the Secretary to make recommendations, it was, of course, aware that he necessarily had given prior thought to the subject of base closures. It thus could not have considered prior thinking on the subject or even prior tentative decisionmaking to be a disqualifying fact. Surely, Congress intended nothing more of the Secretary than that he give meaningful, fresh consideration with respect to any issues previously visited. This is significant because judicial review of whether the Secretary has taken a meaningful fresh look necessarily presents the same kind of judicially unmanageable issues as a review to determine the adequacy of the data utilized by the Secretary.

The Act also provides that the "Secretary shall make available to the Commission and the Comptroller General of the United States all information used by the Department in making its recommendations to the Commission for closures." § 2903(c)(4). The Act thus appears to contemplate that the Commission and the GAO will have access to the Secretary's data base so that they can evaluate his recommendations. The plaintiffs, we think, charge that the Secretary failed to create and transmit to the Commission and the GAO an administrative record containing all of the information the Secretary relied upon in making his recommendations. If this is what the plaintiffs claim, we conclude that their claim is judicially reviewable. Judicial review of that claim presents the kind of issues with which courts have traditionally dealt and we perceive no other evidence of a congressional intent to preclude judicial review of that claim. Indeed, such a review seems entirely consistent with Congress' desire to assure the integrity of the decisionmaking processes. Accordingly, the presumption favoring judicial review must prevail with respect to this category of issues.

We admit to some confusion, however, as to whether the plaintiffs are complaining about the failure to transmit the data, or the adequacy of the data to support the recommendations. Based on the foregoing analysis, the former is reviewable by a court, the latter is not. Similar ambiguity can be found in several other of the claims here. For example, plaintiffs charge the Secretary with having failed to publish in the Federal Register as required by the Act "a summary of the selection process" and "a justification for each recommendation." Complaint at 48. If the point here is that there was no publication and the Act required it, this is clearly a reviewable claim. If the point is that the Act requires individual justification and there were none, this again is reviewable. On the other hand, if the point is that the justifications were unpersuasive or inadequately detailed, this is not a judicially reviewable allegation.

F.

Turning to Count II, the Act requires the Commission to apply the force structure plan and criteria to the current deployment of military forces and make an independent judgment about the Secretary's recommendations. The plaintiffs challenge the decisionmaking process by which the Commission fulfilled this assignment. They charge, for example, that the Commission failed to consider all of the Navy installations equally without regard to previous consideration for closure, that it failed to insist on adequate help from the GAO, that it accepted the recommendation of the Secretary with respect to the Shipyard even though the GAO had concluded that the Navy's decisionmaking was inadequately documented, that it (the Commission) utilized unpublished criteria, and that it failed to apply the published criteria equally to all installations.

We conclude that each of these challenges go to the merits of the recommendations of the Commission and that the merits of those recommendations, like the merits of the recommendations of the Secretary, are not subject to second guessing by the judiciary. We are again in agreement with the court in *NFFE* that the issues raised by a review of the Commission's recommendations are not judicially manageable ones. We note as well that under the Act the President and Congress review the Commission's recommendations, and both are better suited to the task than are the courts.

The Act does, however, require the Commission to hold public hearings, § 2903(d)(1), and the plaintiffs contend that the Commission failed to do so. Here again we are not certain we understand plaintiffs' argument, but if it is that the Act requires the Commission to base its decision solely on the Secretary's administrative record and the transcript of the public hearings, and that the Commission went beyond this record by holding closed-door meetings with the Navy, we believe their contention is judicially reviewable. In so holding, we do not decide that the Act does so require or that a remedy is available under the circumstances of this case even if it does.[15]

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[15] Plaintiffs also argue that the Navy concealed all evidence favorable to the Shipyard and when the plaintiffs later obtained some of this information and called it to the Commission's attention, the Commission failed to reopen its public hearings to receive that information. This is said to violate § 2903(d)(1) which requires the Commission to hold hearings. If the argument is that § 2903(d)(1) required the Commission to receive all relevant information even that tendered after the close of a duly noticed public hearing, judicial review of that claim seems to us entirely consistent with the congressional intent reflected in the Act and its legislative history. By so holding, we do not, of course, endorse the proposition that the Commission's failure to reopen its hearings was in conflict with § 2903(d)(1). Plaintiffs also appear to contend that the Navy's concealment of evidence favorable

In sum, we conclude that the presumption favoring judicial review is rebutted with respect to a majority of plaintiffs' claims by the fact that the issues presented in such a review would be judicially unmanageable. Where the plaintiffs ask the court to substitute its political and military judgment for that of the Secretary and the Commission, their claims are not reviewable. The plaintiffs do, however, ask for judicial review of issues that the judiciary is entirely competent to address. With respect to those issues we find the presumption in favor of judicial review unrebutted by the other alleged indicia of congressional intent. While our analysis leaves the district court with a line drawing task, it should provide the guidance necessary for disposition of plaintiffs' numerous challenges.

IV.

As an alternative ground for its decision, the district court held that the political question doctrine prevented it from reviewing the actions of the Secretary and the Commission. Noting that the Act is a carefully wrought compromise which provides both the President and Congress with an opportunity to reject the Commission's recommendations, the court reasoned that this case is "one which [is] impossible for the court to resolve independently without expressing a lack of respect due the coordinate

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to the Shipyard violated § 2903(c)(4) of the Act which requires the Secretary of Defense to "make available to the Commission and the Comptroller General of the United States all information used by the Department in making its recommendations." If this claim is that the Secretary of Defense failed to forward information considered by him in formulating his recommendations, that claim is reviewable. On the other hand, if this claim is that, because of the Navy's concealment, the Secretary of Defense *failed* to consider evidence that he should have considered, judicial review is not available.

branches of government." *Specter*, slip op. at 5, *alluding to language in Baker v. Carr*, 369 U.S. 186 (1962).

The Court in *Baker* described the elements that identify a nonjusticiable political question:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.[16] More recently, in *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986), the Court explained that "[t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." The Court also emphasized, however, that "one of the Judiciary's characteristic roles is to interpret statutes" and determine the obligations of the Executive under relevant statutes, and "we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.*

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[16] The Court in *Baker* held that an equal protection challenge to the apportionment scheme of the Tennessee General Assembly did not present a nonjusticiable political question.

The authorities cited above clearly demonstrate that, while it is not the role of the courts to disturb policy decisions of the political branches, the question of whether an agency has acted in accordance with a statute is appropriate for judicial review. In particular, we do not read those authorities as precluding judicial review of any of the kinds of issues we have previously identified as judicially reversible. If, for example, the statute requires that a decision of the Commission be based solely on the record transmitted by the Secretary and that produced during the public hearing, the political question doctrine, we conclude, would not bar review.

Defendants defend the district court's decision by pointing out that whichever of plaintiffs' claims one addresses, "the *relief* sought by [them] interferes directly with the policy decision to close the Shipyard and other installations." Brief for Appellees at 37. The fact that judicial review might undermine the Commission's policy choices, however, cannot by itself mean that review is not available. Judicial review of agency action almost always holds the potential to disrupt the agency's policy decisions. *Japan Whaling,* for example, involved a challenge to a decision by the Secretary of Commerce not to certify Japan under the Fishery Conservation and Management Act as acting to the detriment of an international whaling agreement. This certification, if made, would have forced the Secretary to repudiate an existing executive agreement with Japan allowing for a more gradual decrease in that country's commercial whaling. The Court, "cognizant of the interplay between [the statute] and the conduct of this Nation's foreign relations," nevertheless held the case to present a justiciable question of determining whether the Secretary had met his duty under the statute, "a recurring and acceptable task for the federal courts." 478 U.S. at 230.

Defendants also argue that "the lack of respect that gives rise to a political question is especially pronounced in this case because the Act assigns Congress, rather than the courts, the role of passing judgment on the base closure decision of the Executive branch." Brief for Appellees at 38. While we agree that the Act assigns this role to Congress and that this assignment is highly relevant to some of the judicial review issues posed by this case, we cannot agree that Congress's role under the Act precludes all judicial review. If congressional oversight were alone enough to create a nonjusticiable political question, the doctrine would grow to unmanageable dimensions: Congress "exercises oversight over all agencies, gets reports from many, and is often consulted by the executive branch before specific actions are taken." *Armstrong*, 924 F.2d at 292 (quotation omitted) (congressional oversight over agency action does not necessarily indicate intent to preclude judicial review).

Finally, defendants argue that there is "a textually demonstrable constitutional commitment" of the base closing issue "to a coordinate political department." *Baker*, 369 U.S. at 217. That is, decisions concerning military affairs are committed to the political branches under Articles I and II of the Constitution, and the ultimate issue here is the physical disposition of the nation's military forces. Brief for Appellees at 39-40. As plaintiffs point out, however, the fact that one facet of a decision-making process involves an exercise of discretion concerning military affairs does not insulate all aspects of that process from judicial review. *Friends of the Earth v. U.S. Navy*, 841 F.2d 927 (9th Cir. 1988) (federal environmental statutes require Navy to obtain state permit before constructing port; Navy enjoined from construction until permit issued). The authorities cited by defendants are not to the contrary; in these cases, the courts were asked to

involve themselves in matters well beyond judicial competence. *See Luftig v. McNamara,* 373 F.2d 664 (1967) (private in U.S. Army sought to have Vietnam War declared illegal and unconstitutional), *cert. denied,* 387 U.S. 945 (1967); *Gilligan v. Morgan,* 413 U.S. 1 (1973) (in wake of shootings at Kent State, students sought judicial review and continuing surveillance over training, weaponry, and orders of National Guard).

VI.

In Count III of the complaint, the union and Shipyard employee plaintiffs allege that the defendants' disregard of the Act constitutes a violation of their rights under the Fifth Amendment Due Process Clause. They assert "that they possess a property interest under the . . . Act in the Shipyard's continued operation unless and until it is determined, pursuant to a . . . process in accordance with the mandates of the . . . Act, that the Shipyard should be closed." Brief for Appellants at 40. In response, defendants argue that these plaintiffs have no cognizable "property interest" in the operation of the Shipyard.

It is well settled that protectable property interests can arise from a statutory scheme which creates legitimate claims of entitlement to particular benefits. *Board of Regents v. Roth,* 408 U.S. 564, 576-77 (1972). Even where an intent to bestow a benefit on private individuals is clear, however, a statutory requirement that certain procedures be observed before a benefit can be withdrawn does not in itself create a protected property interest. *Olim v. Wakinekonka,* 461 U.S. 238, 249-51 (1983); *Stephany v. Wagner,* 835 F.2d 497, 500 (3d Cir. 1987), *cert. denied,* 487 U.S. 1207 (1988); *see also, Hill v. Group Three Housing Dev. Corp.,* 799 F.2d 385, 391 (8th Cir. 1986) (intent to benefit plaintiff not enough to create cognizable prop-

erty interest). The mere fact that the Shipyard cannot be closed without meeting the requirements of the Act does not mean that Shipyard employees have a valid due process claim when those procedures are not observed. Rather, the dispositive question in deciding whether the statute creates a protectable property interest is whether it places substantive limits on official discretion for the benefit of shipyard workers. *Stephany,* 835 F.2d at 500, *quoting Olim,* 461 U.S. at 249. The statute must contain "explicitly mandatory language, i.e. specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow," in order to create a property interest. *Kentucky Dep't of Corrections v. Thompson,* 490 U.S. 454, 463 (1989); Put another way, the complainant "must show that particularized standards or criteria guide the [government's] decisionmakers" in order to claim protection under the due process clause. *Olim,* 461 U.S. at 249 (quotation omitted).

While the Act establishes a specific process for closing military installations, it places no substantive limits on any of the decisionmakers. The Secretary is allowed to develop and publish criteria and a force structure plan, without specific guidance from the statute, and has broad discretion in applying those standards to current domestic deployment of military resources. The Commission also is accorded broad discretion in applying those standards and may accept the Secretary's recommendations even if they deviate substantially from the final criteria and force structure plan. *See* § 2903(d)(2)(B). Finally, the President and Congress, of course, may reject the Commission's recommendations for any reason at all. *See* §§ 2903(e), 2904(b).

In sum, the Act specifies a particular process but does not guarantee a particular outcome. As a result, the unions and the Shipyard employees can identify no legiti-

mate claim of entitlement under the Act and Count III fails to state a due process claim upon which relief could be granted.

VII.

The judgment of the district court is reversed and this case is remanded to that court for further proceedings consistent with this opinion.

ATTO, *Circuit Judge*, concurring in part and dissenting in part.

I join parts I, II, IV, and V of the opinion of the court, but I disagree with the court's decision insofar as it holds that some of the challenged administrative actions are subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701 and 702.

As the court notes (maj. typescript at 16-17), there is a "general presumption favoring judicial review of administrative action," but this presumption may be overcome by express statutory language, legislative history, or "inferences of intent drawn from the statutory scheme as a whole." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349, 351 (1984). Assuming that this presumption applies in the present context,[1] I conclude that the legislative history and the statutory scheme, considered together, show that Congress meant to preclude review.[2]

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[1] The defendants question whether this presumption applies because of the national security ramifications of base closing and realignment decisions.

[2] The majority states that "at least in one sense, we are here asked to review a presidential decision" (maj. typescript at 20). As I interpret the complaint and the plaintiffs' brief, however, they seek review, not of Presidential action, but of actions taken by the named defendants, i.e., the Secretary of Defense, the Secretary of the Navy, the Defense

I.

The legislative history must be viewed in light of the problems that Congress confronted when it enacted the Base Closure and Realignment Acts of 1988 and 1990. Congress undoubtedly recognized that objective and prompt decisions concerning base closings are vitally important, particularly at a time of budgetary problems and rapidly changing defense needs.[3] At the same time, Congress was acutely aware that for more than a decade before the passage of these laws, every attempt to close or realign a major base in this country had been blocked by Congress itself or by the courts.[4] The 1988 and 1990 Acts were devised to clear away the major obstacles that had produced this costly impasse.

One of the chief obstacles targeted by Congress was litigation that had obstructed base closing and realignment

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Base Closure and Realignment Commission, and its members. Accordingly, I see no need to decide whether actions of the President are reviewable under the APA or under administrative "common law."

Because the plaintiffs do not appear to seek review of Presidential action and because the defendants' actions would not have affected the plaintiffs if the President had not accepted the Commission's recommendations, it could be argued that the defendants' actions did not constitute "final agency action" under 5 U.S.C. § 704. I see no need to decide this question, however, because I conclude that the defendants' actions are not reviewable on other grounds.

[3] *See* Defense Base Closure and Realignment Commission, *Report to the President 1991* at v-vi [hereinafter *Commission Report*]; Hanlon, *Military Base Closings: A Study of Government by Commission*, 62 U. Colo. L. Rev. 331, 336, 358 (1991).

[4] *See, e.g., Base Closure: Joint Hearings on H.R. 1583 to Establish the Bipartisan Commission on the Consolidation of Military Bases Before the Military Installations and Facilities Subcommittee of the House Committee on Armed Services and Defense Policy Panel*, 100th Cong., 2d Sess. 349 (1988) (statement of Rep. Armey) [hereinafter *Joint Hearings*]; *Commission Report* at 1-4.

efforts. *See* H. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988) [hereinafter 1988 Conf. Rep.], *reprinted in* 1988 U.S. Code Cong. & Admin. News 3403. In 1977, Congress had enacted legislation requiring the Department of Defense to comply with various procedural requirements, including the preparation of an environmental impact statement under the National Environmental Policy Act of 1969 [hereinafter NEPA], before carrying out any major base closing or realignment. 10 U.S.C. § 2687(b)(1)-(3) (Supp. I 1977). In some instances, NEPA challenges had dragged on in the courts for years and had successfully blocked the closing of assertedly obsolete and unneeded bases. *See* 1988 Conf. Rep. at 23, 1988 U.S. Code Cong. & Admin. News at 3403. Both the 1988 and 1990 Acts dealt directly with this specific problem by generally prohibiting NEPA review.[3] While we are not concerned with NEPA review in this case, this experience is nevertheless instructive for present purposes. It demonstrates that Congress, anxious to remove the impediments that had effectively prevented base closings and realignments for more than a decade, was keenly aware how litigation concerning procedural requirements could be successfully used to stall and ultimately defeat base closing plans.

Unfortunately, while Congress expressly addressed the problem of NEPA review in the body of the 1988 and 1990 Acts, Congress did not confront the question of APA review in the same clear and direct manner. Instead, Congress relegated this question to discussion in the Conference Report. H.R. Conf. Rep. No. 101-923, 101st Cong., 2d Sess. 706 (1990) [hereinafter 1990 Conf. Rep.] *reprinted in* 1990 U.S. Code Cong. & Admin. News 3258. More-

[3] Base Closure and Realignment Act of 1988, Pub. L. No. 100-526 § 202(b), 208, 102 Stat. 2623, 2627 (1988) [hereinafter 1988 Act]; Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, § 2905(c)(1), 104 Stat. 1808-19 [hereinafter 1990 Act].

over, the relevant passage in the Conference Report, which is set out in full in the court's opinion (majority typescript at 29), is not a model of clarity, as the majority points out (*id.* at 30-31). The passage in the report jumbles together several separate administrative law concepts—the military affairs exception to the APA's general rulemaking and adjudication provisions (5 U.S.C. §§ 553(a)(1), 554(a)(4)), the concept of final agency action (5 U.S.C. § 704), and the availability of judicial review (5 U.S.C. §§ 701(a), 702). No party in this case has been able to provide a fully satisfactory exegesis of this passage—nor can I. Still, I do not think that this passage, particularly when viewed in light of the background recounted above, can be wholly dismissed. The passage does state quite clearly that there would be no APA review of key decisions in the base closing and realignment process, including the President's decision to accept the Commission's package of recommendations and the Secretary of Defense's actions in implementing that package after the 45-day report-and-wait period. Because the issuance of the Commission's package is not included in this list, I agree with the majority that this passage alone is not enough to overcome the strong presumption in favor of judicial review. Nevertheless, I believe that this passage, despite its ambiguities, provides support for the proposition that Congress did not want APA review to interfere with its detailed base closing and realignment scheme.[6]

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[6] *See also* [sic] Cong. Rec. H100143 (daily ed. Nov. 13, 1991) (in recommending certain amendments to the 1990 Act, the conferees on the 1991 amendments "reaffirm the view, expressed in the [Conference Report on the 1990 Act] that actions taken under the Act . . . would not be subject to judicial review."); 137 Cong. Rec. S17411 (daily ed. Nov. 21, 1991) (statement of Sen. Nunn that the conferees' 1991 statement had the same meaning as the passage in the 1990 Conference Report).

II.

"[T]he inferences of intent drawn from [this] scheme" (*Block*, 467 U.S. at 349) point clearly toward the same conclusion. This innovative scheme was designed to obviate the institutional impediments that were thought to have contributed to the decade-long impasse regarding base closings and realignments. Under this scheme, an independent, bipartisan Defense Base Closure and Realignment Commission was created to formulate a package of recommended closings and realignments. 1990 Act § 2902. After receiving submissions from the Department of Defense, the Commission must draw up and send its package of recommendations to the President by July 1 of the year in question. *Id.* § 2903(a)-(d). Within a short time – by July 15 – the President must choose between two options: (a) he may approve the entire package and transmit it to Congress or (b) he may disapprove the package in whole or in part and send it back to the Commission for reconsideration. *Id.* § 2903(e). If the President selects the first option and approves the package, Congress may disapprove the entire package by joint resolution within 45 days. *Id.* § 2904(b). If Congress fails to do so, all of the slated closings and realignments may be carried out. *Id.*

If the President selects the second option and sends the package of recommendations back to the Commission, the Commission must issue a revised package by August 15. *Id.* § 2903(c)(3). The President may then approve or disapprove the entire revised package. *Id.* § 2903(e)(4). If he approves, the package is sent to Congress, and the procedure just described is followed. If he disapproves, the process ceases. *Id.* § 2903(e)(5).

This scheme was designed to eliminate at least three obstacles that had thwarted past efforts to close bases. First, the scheme sought to prevent delaying tactics by

setting short, inflexible time limits for action by the Commission, the President, and the Congress. The legislative history makes it abundantly clear that speed and finality were regarded as indispensable components of the new scheme. The House Conference Report stated that one of the main defects in the prior procedures was that "[c]losures and realignments [have] taken a considerable period of time and [have] involved numerous opportunities for challenges in court." 1990 Conf. Rep. at 705, 1990 U.S. Code Cong. & Admin. News 3257. The Report added that the new scheme was intended to expedite this process.[7] Representative Les Aspin, the chairman of the House Armed Services Committee and one of the sponsors of the 1988 Act,[8] reiterated the same point, stating that the new plan was intended to streamline current law on base closures to allow for expeditious closure of bases once the decision to close had been fully reached under the process." 137 Cong. Rec. H6007 (daily ed. July 31, 1991). Representative Dick Armey, one of the architects of the new scheme,[9] stated on the House floor:

> [O]ne huge advantage to this base closing procedure is that it allows a base closing decision to be made with some finality. In the past, proposed base closings were often disputed for year[s] before a final verdict was rendered. That was the worst of all possible worlds. Even if the base was eventually saved

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[7] The Report stated (1990 Conf. Rep. at 707, 1990 U.S. Code Cong. & Admin. News at 3257): "A new process involving an independent, outside commission will permit base closure to go forward in a prompt and rational manner. . . . The new procedures would considerably enhance the ability of the Department of Defense to promptly implement proposals for base closures and realignment."

[8] H.R. Rep. No. 100-1071, pt. I, 100th Cong., 2d Sess. 8 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 3355, 3357.

[9] *Id.*

> from closure, the businesses around the base were greatly harmed by the persistent uncertainty.
>
> Under this procedure, however, all the communities affected [have] a chance to thoroughly make their case for their base. Now, this time of deliberation will come to an end and the decision will be made. At this point communities can roll up their sleeves, pull together, and find the best way to adjust to the base closure.

Id. at H6008.[10] On another occasion, Representative Armey wrote that "the supporters of obsolete bases . . . by enacting an array of environmental study mandates, advance notice requirements, and gratuitous red tape . . . have simply ground base closings to a halt."[11] He went on to explain that after a proposed closing is delayed for years by litigation "the local citizenry and members of Congress are thoroughly aroused, and the political pressures to cancel the closing order are all but insurmountable."[12] *See also Joint Hearings* at 19 (statement of Rep. Armey); 134 Cong. Rec. H16715 (daily ed. Apr. 13, 1988) (statement of Rep. Armey).

Second, the new scheme was designed to insulate base closing and realignment decisions from actual or apparent influence by partisan and other political considerations. In the past, Executive Branch recommendations had often been criticized and defeated on the ground that particular bases had been doomed or spared based on improper political factors. For example, Representative Armey said

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[10] *See also* Armey, *Base Maneuvers – The Games Congress Plays with the Military Pork Barrel, Joint Hearings* at 30, 35, *reprinted from* Policy Review, Winter 1988, at 70, 75 [hereinafter *Base Maneuvers*].

[11] *Base Maneuvers* at 72.

[12] *Id.*

that prior base closing decisions had been "contaminated by unworthy political considerations" and that particular bases had been closed or retained in order to punish or reward members of Congress. 137 Cong. Rec. H6008 (daily ed. July 31, 1991).[13] Other members echoed these sentiments.[14] *See also Commission Report* at 1-1, 1-2.

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[13] *Joint Hearings*, at 20-21 (statement of Rep. Armey quoting past statements by Senators Bumpers and Heinz); *id.* at 17 (statement of Rep. Armey) ("To put it bluntly, there is a widespread fear in Congress that an Administration with unrestricted base closure power may use that power as a political weapon to intimidate Congress."); *id.* at 349 (statement of Rep. Armey) ("[T]here is a fear that an Administration may use the threat to close particular military bases in order to influence the votes of members of Congress."). *See also* 1990 Conf. Rep. at 705, 1990 U.S. Code Cong. & Admin. News at 3257; H.R. Rep. 100-735 (II), 100th Cong., 2d Sess. 8-9, *reprinted in* 1988 U.S. Code Cong. & Admin. News at 3370, 3372 [hereinafter 1988 House Report pt. II].

[14] *See, e.g.*, 137 Cong. Rec. H6008 (daily ed. July 31, 1991) (statement of Rep. Weldon) ("I supported the base closing process in the legislation . . . because I wanted to remove [the] politics of the process of closing bases, and I think to a large extent we have done that from the standpoint of Republican versus Democratic politics"); *id.* at H6010 (statement of Rep. Snowe) ("This process was intended to remove the supposed evil of congressional politics from the base closure process"); *id.* at H6038 (statement of Rep. Fazio) ("Many serious and legitimate concerns were raised as to the political nature of the base closure recommendations when Secretary Cheney released his first list in January 1990. Because of these concerns, Congress included legislation as part of the fiscal year 1991 Defense authorization bill which put in place a clear, objective, and fair process for closing bases"). The legislative history of the 1988 Act reflected similar views. *See* 1988 House Report pt. II at 9, 1988 U.S. Code Cong. & Admin. News at 3372 ("[P]olitical pressure has thwarted attempts to effect savings and efficiencies by shutting down unneeded facilities, and the resulting belief that only by creating an expedited and automatic mechanism, insulated from the political pressures of the normal legislative process, will such savings be achieved.").

The new scheme sought to remove any possible grounds for such charges by transferring the responsibility for recommending closings and realignments to an independent, nonpartisan body. Furthermore, the new scheme recognized that political considerations might creep back into the decisionmaking process if either the President or the Congress was permitted to add particular bases to or remove particular bases from the list formulated by the Commission. The new scheme therefore prohibited any such additions or deletions, restricting the President's and Congress's options to the acceptance or rejection of the Commission's entire list. The House Report on the 1990 Act explained that the "right way" to close bases is to use "a highly respected bipartisan commission [to] recommend bases for realignment or closure based on a number of neutral and widely endorsed criteria" and to give Congress the opportunity to accept or reject the recommendations as a whole. H.R. Rep. No. 655, 101st Cong., 2d Sess. 341, *reprinted in* 1990 U.S. Code Cong. & Admin. News 2931, 3067. Likewise, the House Report on the 1988 Act explained: "[A] major concern underlying the 'Base Closure Commission' proposal is that political pressures in the Congress could block the closing of particular facilities. One important element of the Committee's procedure that is designed to allay that concern is the provision that the resolution may not be amended by the Congress." 1988 House Report pt. II at 9, 1988 U.S. Code Cong. & Admin. News at 3372.

Third, the new scheme apparently reflected the belief that Congress, although previously unable to agree on any major base closings, would find it easier to approve a package of recommended closings that had to be accepted or rejected in its entirety. Chairman Aspin repeatedly em-

phasized this point in public statements,[15] and his predictions proved accurate. While no major closing or alignment had been accomplished since the 1970s, the Commission's 1991 recommendations were approved by the President, and a proposed joint resolution of disapproval lost in the House by an overwhelming margin. 137 Cong. Rec. H6006 (daily ed. July 30, 1991).

III.

In my view, judicial review of base closing decisions is inconsistent with this scheme because a successful challenge – i.e., one that at least temporarily invalidates a base closing decision – would thwart the scheme's fundamental objectives.

First, it seems clear that judicial review would undermine the concepts of speed and finality that Congress regarded as vital parts of its plan. *See Morris v. Gressette*, 432 U.S. 491, 503-04 (1977). In the vast majority of cases, judicial review could not be completed within the short time limits imposed by the Act. The majority acknowledges (maj. typescript at 17) that "the Act's timetable is inconsistent with judicial review prior to the final decision on which bases to close," but the majority "sees little ten-

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[15] *See* Morrison, *Caught Off Base*, 21 Nat'l J. 801, 801 (1989) (quoting Rep. Aspin); Mills, *Base Closings: The Political Pain Is Limited*, 46 Cong. Q. Weekly Rep. 3625 (1988) (quoting Rep. Aspin). *See also* 137 Cong. Rec. H6022 (daily ed. July 31, 1991) (statement of Rep. Holloway); Mills, *Challenge to Base Closings Fizzles on House Floor*, 47 Cong. Q. Weekly Rep. 2062 (1989); Mills, *Pain in Members' Home States Fails to Move Minds on Hill*, 47 Cong. Q. Weekly Rep. 604 (1989); Towell, *Hill Paves Way for Closing Old Base*, 46 Cong. Q. Weekly Rep. 2999 (1988) ("[B]y forcing Congress to deal with the proposal as a package, the new procedure [made] it harder for members to cut deals to protect individual bases in their home district against cutbacks.").

sion between that timetable and judicial reveiw after a final list of bases for closure" has been approved by the President and not disapproved by the Congress.

I disagree. The new scheme crafted by Congress contemplates that a truly "final" decision on a package of closings and realignments would be completed within the short time periods set out.[16] The scheme did not contemplate that this "final" decision would then be subject to judicial review, possible reversal, and further action by the Commission, the President, and the Congress.

Furthermore, judicial review of one part of a purportedly "final" package will often implicate other parts of the package. Decisions regarding base closings sometimes involve hard choices concerning the relative merits of comparable bases. (In this case, for example, a major theme in the plaintiffs' complaint is the Philadelphia Naval Yard's claimed superiority over other similar naval yards that the Commission evaluated more highly and therefore recommended be retained.) Thus, if the Commission decides to recommend closure of [sic] base A rather than Base B and the decision on Base A is reversed after judicial review of the Commission's procedures, the decision to recommend retention of Base B will logically be called into question. In this way, judicial review of one part of the "final" package may reopen other parts of the package as well—or require the taxpayers to pay for clearly redundant facilities.

Not only would judicial review after a purportedly "final" decision upset the timetable set out in the Act, but

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[16] In providing for very limited NEPA review—of property disposal and relocation actions to be taken after a final closing or alignment decision (1990 Act § 2905(c)(2))—Congress imposed a very short (60-day) statute of limitations. No statute of limitations was prescribed for a suit of the type at issue here. This seems a clear indication that no such suits were contemplated.

such review would undermine the concept that neither the President nor Congress should be permitted to approve or disapprove the closing of a particular base but should instead be restricted to choosing between acceptance or rejection of the Commission's entire package. If the plaintiffs in this case succeed on their underlying APA claims and the Commission is required to conduct further proceedings and issue a new recommendation regarding the Philadelphia Naval Yard, the President and the Congress would then be placed in precisely the situation that the new scheme was designed to avoid—deciding whether to close or spare a single base.

In sum, it seems to me that the statutory scheme is grounded on concepts—speed, finality, and limiting the President and the Congress to an all-or-nothing choice on a package of recommendations—that are inconsistent with judicial review under the APA. Certainly I do not suggest that review of the decision regarding the Philadelphia Naval Yard will bring the statutory scheme tumbling down, and I am unable to predict what effect if any the precedent set by this case will have on litigation concerning future attempted closings. I conclude only that judicial review of base closing and realignment decisions is conceptually inconsistent with the innovative scheme enacted by Congress. This analysis, reinforced by the legislative history, leads me to the conclusion that base closing decisions are not reviewable under the APA.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 91-1932

SEN. ARLEN SPECTER; SEN. HARRIS WOFFORD; SEN. BILL BRADLEY; SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY; COMMONWEALTH OF PENNSYLVANIA; ERNEST D. PREATE, JR., PENNSYLVANIA ATTORNEY GENERAL; REP. CURT WELDON, REP. THOMAS FOGLIETTA; REP. ROBERT ANDREWS; REP. R. LAWRENCE COUGHLIN; CITY OF PHILADELPHIA; HOWARD-J. LANDRY; INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL; METAL TRADES COUNCIL, LOCAL 687 MACHINISTS; GOVERNOR JAMES J. FLORIO; STATE OF NEW JERSEY; ROBERT J. DEL TUFO, NEW JERSEY ATTORNEY GENERAL; GOVERNOR MICHAEL N. CASTLE; STATE OF DELAWARE; REP. PETER H. KOSTMEYER; REP. ROBERT A. BORSKI, RONALD WARRINGTON; PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION LOCAL NO. 2

v.

H. LAWRENCE GARRETT, III, SECRETARY OF THE NAVY; RICHARD CHENEY, SECRETARY OF DEFENSE; THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION, AND ITS MEMBERS; JAMES A. COURTER; WILLIAM L. BALL, III; HOWARD H. CALLAWAY; DUANE H. CASSIDY; ARTHUR LEVITT, JR.; JAMES C. SMITH, II; ROBERT D. STUART, JR.,

U.S. SEN. ARLEN SPECTER, U.S. SEN. HARRIS WOFFORD, U.S. SEN. BILL BRADLEY, U.S. SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY, THE COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., GOVERNOR JAMES J. FLORIO, THE STATE OF NEW JERSEY, NEW JERSEY ATTORNEY GENERAL ROBERT J. DEL TUFO, GOVERNOR MICHAEL N. CASTLE; THE

STATE OF DELAWARE, U.S. REP. CURT WELDON, U.S. REP. THOMAS FOGLIETTA, U.S. REP. ROBERT E. ANDREWS, U.S. REP. R. LAWRENCE COUGHLIN; U.S. REP. PETER H. KOSTMAYER, U.S. REP. ROBERT A. BORSKI, THE CITY OF PHILADELPHIA, HOWARD J. LANDRY, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL, METALS TRADES COUNCIL, LOCAL 687, MACHINISTS, RONALD WARRINGTON; THE PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION, LOCAL NO. 2, APPELLANTS

SUR PETITION FOR REHEARING

Before: SLOVITER, *Chief Judge,* STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, and ALITO, *Circuit Judges*

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Alito would have granted rehearing.

By the Court,

/s/ WALTER K. STAPLETON
Circuit Judge

Dated: May 20, 1992

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 91-4322

SEN. ARLEN SPECTER, ET AL.

v.

H. LAWRENCE GARRETT, III,
SECRETARY OF THE NAVY, ET AL.

[FILED NOVEMBER 1, 1991]

MEMORANDUM AND ORDER

BUCKWALTER, J.

I will grant the defendants' motion to dismiss because:
(a) the statute precludes judicial review; and
(b) the political question doctrine forecloses judicial intervention.

A. *THE STATUTE PRECLUDES JUDICIAL REVIEW*

Plaintiffs have asserted that their right to judicial review for Counts I and II arises under the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1977), hereafter APA. The presumption of judicial review of federal agency action under the APA is well established. *See Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967). This presumption, like all presumptions used in interpreting

statutes, may be overcome by the appropriate showing of congressional intent. *Block v. Community Nutrition Institute,* 467 U.S. 340, 349 (1984). The APA specifically provides two methods for overcoming the presumption of judicial review in § 701(a). For purposes of this case, we are concerned only with the first method in § 701(a)(1), which provides for no judicial review under the APA "to the extent that—(1) statutes preclude judicial review . . ." 5 U.S.C. §§ 701(a)(1) (1977).

In determining whether a statute precludes judicial review, the Supreme Court has instructed courts to look at "specific language or specific legislative history that is a reliable indicator of congressional intent," "the collective import of legislative and judicial history behind a particular statute," and "inferences of intent drawn from the statutory scheme as a whole." *Block,* 467 U.S. at 349. As long as the congressional intent to preclude judicial review is "fairly discernible in the statutory scheme," the presumption favoring judicial review has been overcome. *Id.* at 351.

Applying these standards, the court finds that the Defense Base Closure and Realignment Act of 1990 precludes judicial review for the following reasons. Initially, specific language in the legislative history of the Act indicates a congressional intent to preclude judicial review. The House Conference Report provides:

> The rulemaking (5 U.S.C. 553) and adjudication (5 U.S.C. 554) provisions of the Administrative Procedures Act (5 U.S.C. 551 et seq.) contain explicit exemptions for "the conduct of military or foreign affairs function." An action falling within this exception, as the decision to clear and realign bases surely does, is immune from the provisions of the Administrative Procedures Act dealing with hearings (5 U.S.C. 556) and final agency decisions (5 U.S.C. 557). Due to the

> military affairs exception to the Administrative Procedure Act, no final agency action occurs in the case of various actions required under the base closure process contained in this bill. These actions, therefore, would not be subject to the rulemaking and adjudication requirements, and would not be subject to judicial review. Specific actions which would not be subject to judicial review include the issuance of a force structure plan . . . , the issuance of selection criteria . . . , the Secretary of Defense's recommendation of closures and realignments of military installations . . . , the decision of the President . . . , and the Secretary's actions to carry out the recommendations of the Commission. . . .

H.R. Conf. Rep. 101-923, 101st Cong., 2d Sess. 706, *reprinted in* 1990 U.S. Code Cong. & Admin. News 3110, 3258.

This passage in the legislative history expresses a clear congressional intent to preclude judicial review under the APA of all actions taken pursuant to the Base Closure Act.

Other indicia of statutory intent to preclude judicial review is the Act's concern with "the timely closure and realignment of military installations." Section 2901(b). The House Conference Report stated a desire for the base closure process under the 1990 Act to correct the failings of the base closure process under the then existing law, which included that closures and realignments "take a considerable period of time and involve numerous opportunities for challenge in court." H.R. Conf. Rep. 101-923, 101st Cong. 2d Sess. 705, reprinted in 1990 U.S. Code Cong. & Admin. News 3110, 3257. The Report further stated that the new process under the 1990 Act "involving an independent, outside commission will permit base closures to go forward in a prompt and rational manner." *Id.*

This language in the legislative history indicates that there was concern that judicial review of base closures had been preventing the base closure process from moving forward in a timely manner. The desire to correct this shortcoming under the then existing law further supports the contention that no judicial review was contemplated by the 1990 Act. While the arguments proposed by both sides on this issue are extensive, I have written this memorandum in a rather summary fashion in the interest of time, but not at the expense of a thorough analysis of the arguments on both sides. In brief, I find that the intent to preclude judicial review is "fairly discernible in the statutory scheme."

B. *THE POLITICAL QUESTION DOCTRINE FORECLOSES JUDICIAL INTERVENTION*

"Our discussion, even at the price of extending this opinion, requires review of a number of political question cases, in order to expose the attributes of the doctrine – attributes which, in various settings, diverge, combine, appear and disappear in seemingly disorderliness". *Baker v. Carr,* 369 U.S. 186, 210 (1962).

Based on my own review of cases as well as treatises on the subject, I believe that Justice Brennan's statement in the *Baker* case, *supra,* remains as true today as it was 29 years ago. Nevertheless, the *Baker* case did describe the attributes of a political question and expressed them in the following manner:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve

> a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

In a sense, the invoking of the political question doctrine is no more than a correlative of my first conclusion that the Defense Base Closure and Realignment Act of 1990 precludes judicial review.

On the other hand, the doctrine can stand by itself, it seems to me, as one which recognizes that in certain cases, the concept of separation of powers strongly suggests that the judiciary should defer in certain controversies to one or both of the other branches of government.

In reviewing the formulations in *Baker,* I felt that the present case represented one which was impossible for the court to resolve independently without expressing lack of respect due the coordinate branches of government.

The respect due to the other branches of government comes in part from a recognition that all branches are deeply concerned with conducting their affairs in the manner which is consistent with the constitution. Indeed, all three branches are involved in interpreting it. It is true, of course, that normally the judicial branch undertakes the ultimate review of laws and in so doing will not always agree with the interpretation of the other branches.

Under the political question doctrine, when should the judiciary defer to the other branches' views as opposed to simply undertaking judicial review and stating its own views, whether or not they differ from the other branches?

Unfortunately, there is no particular guidance in case law for determining the answer to that question as the first quotation from *Baker* indicates. The simple answer is, RARELY. Nevertheless, one must view the particular setting in which the question is raised. The case now before me comes with a significantly long history of attempts to close military bases and the problems resulting from such attempts. The Act of 1990 is the most recent in a series of efforts by Congress to resolve those problems fairly. Among other things, it provides for a review by Congress of the recommendations of the Commission, thereby giving members of Congress the opportunity to dispute those recommendations. As permitted by the Act, both the President and the Congress have approved the recommended base closures. While plaintiffs view defendants' raising of the political question doctrine as specious, I must disagree. Although I view it as a doctrine which should be used sparingly, this case fairly calls for its invocation.

In conclusion, I believe that it would be impossible to undertake judicial review of the decision on base closures made by the duly elected representatives of this country without expressing a lack of the respect due those branches of government.

Based on the foregoing opinion, the following order is entered:

ORDER

AND NOW, this 1st day of November, 1991, it is hereby ORDERED that defendants' Motion to Dismiss is GRANTED; the court enters judgment for the defendants and the plaintiffs' claims are DISMISSED WITH PREJUDICE.

BY THE COURT:

/s/ Ronald L. Buckwalter

RONALD L. BUCKWALTER, J.

APPENDIX D

Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808:

SEC. 2901. SHORT TITLE AND PURPOSE

(a) SHORT TITLE.—This part may be cited as the "Defense Base Closure and Realignment Act of 1990".

(b) PURPOSE.—The purpose of this part is to provide a fair process that will result in the timely closure and realignment of military installations inside the United States.

SEC. 2902. THE COMMISSION

(a) ESTABLISHMENT.—There is established an independent commission to be known as the "Defense Base Closure and Realignment Commission".

(b) DUTIES.—The Commission shall carry out the duties specified for it in this part.

(c) APPOINTMENT.—(1)(A) The Commission shall be composed of eight members appointed by the President, by and with the advise and consent of the Senate.

(B) The President shall transmit to the Senate the nominations for appointment to the Commission—

(i) by no later than January 3, 1991, in the case of members of the Commission whose terms will expire at the end of the first session of the 102nd Congress;

(ii) by no later than January 25, 1993, in the case of members of the Commission whose terms will expire at the end of the first session of the 103rd Congress; and

(iii) by no later than January 3, 1995, in the case of members of the Commission whose terms will expire at the end of the first session of the 104th Congress.

(2) In selecting individuals for nominations for appointments to the Commission, the President should consult with—

(A) the Speaker of the House of Representatives concerning the appointment of two members;

(B) the majority leader of the Senate concerning the appointment of two members;

(C) the minority leader of the House of Representatives concerning the appointment of one member; and

(D) the minority leader of the Senate concerning the appointment of one member.

(3) At the time the President nominates individuals for appointment to the Commission for each session of Congress referred to in paragraph (1)(B), the President shall designate one such individual who shall serve as Chairman of the Commission.

(d) TERMS.—(1) Except as provided in paragraph (2), each member of the Commission shall serve until the adjournment of Congress sine die for the session during which the member was appointed to the Commission.

(2) The Chairman of the Commission shall serve until the confirmation of a successor.

(e) MEETINGS.—(1) The Commission shall meet only during calendar years 1991, 1993, and 1995.

(2)(A) Each meeting of the Commission, other than meetings in which classified information is to be discussed, shall be open to the public.

(B) All of the proceedings, information, and deliberations of the Commission shall be open, upon request, to the following:

(i) The Chairman and the ranking minority party member of the Subcommittee on Readiness, Sustainability, and Support of the Committee on Armed

Services of the Senate, or such other members of the Subcommittee designated by such Chairman or ranking minority party member.

(ii) The Chairman and the ranking minority party member of the Subcommittee on Military Installations and Facilities of the Committee on Armed Services of the House of Representatives, or such other members of the Subcommittee designated by such Chairman or ranking minority party member.

(iii) The Chairman and ranking minority party members of the Subcommittees on Military Construction of the Committees on Appropriations of the Senate and of the House of Representatives, or such other members of the Subcommittees designated by such Chairmen or ranking minority party members.

(f) VACANCIES.—A vacancy in the Commission shall be filled in the same manner as the original appointment, but the individual appointed to fill the vacancy shall serve only for the unexpired portion of the term for which the individual's predecessor was appointed.

(g) PAY AND TRAVEL EXPENSES.—(1)(A) Each member, other than the Chairman, shall be paid at a rate equal to the daily equivalent of the minimum annual rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which the member is engaged in the actual performance of duties vested in the Commission.

(B) The Chairman shall be paid for each day referred to in subparagraph (A) at a rate equal to the daily equivalent of the minimum annual rate of basic pay payable for level III of the Executive Schedule under section 5314 of title 5, United States Code.

(2) Members shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5, United States Code.

(h) DIRECTOR OF STAFF.—(1) The Commission shall, without regard to section 5311(b) of title 5, United States Code, appoint a Director who has not served on active duty in the Armed Forces or as a civilian employee of the Department of Defense during the one-year period preceding the date of such appointment.

(2) The Director shall be paid at the rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code.

(i) STAFF.—(1) Subject to paragraphs (2) and (3), the Director, with the approval of the Commission, may appoint and fix the pay of additional personnel.

(2) The Director may make such appointments without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and any personnel so appointed may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of that title relating to classification and General Schedule pay rates, except that an individual so appointed may not receive pay in excess of the annual rate of basic pay payable for GS-18 of the General Schedule.

(3) Not more than one-third of the personnel employed by or detailed to the Commission may be on detail from the Department of Defense.

(4) Upon request of the Director, the head of any Federal department or agency may detail any of the personnel of that department or agency to the Commission to assist the Commission in carrying out its duties under this part.

(5) The Comptroller General of the United States shall provide assistance, including the detailing of employees,

to the Commission in accordance with an agreement entered into with the Commission.

(j) OTHER AUTHORITY.—(1) The Commission may procure by contract, to the extent funds are available, the temporary or intermittent services of experts or consultants pursuant to section 3109 of title 5, United States Code.

(2) The Commission may lease space and acquire personal property to the extent funds are available.

(k) FUNDING.—(1) There are authorized to be appropriated to the Commission such funds as are necessary to carry out its duties under this part. Such funds shall remain available until expended.

(2) If no funds are appropriated to the Commission by the end of the second session of the 101st Congress, the Secretary of Defense may transfer, for fiscal year 1991, to the Commission funds from the Department of Defense Base Closure Account established by section 207 of Public Law 100-526. Such funds shall remain available until expended.

(l) TERMINATION.—The Commission shall terminate on December 31, 1995.

SEC. 2903. PROCEDURE FOR MAKING RECOMMENDATIONS FOR BASE CLOSURES AND REALIGNMENTS

(a) FORCE-STRUCTURE PLAN.—(1) As part of the budget justification documents submitted to Congress in support of the budget for the Department of Defense for each of the fiscal years 1992, 1994, and 1996, the Secretary shall include a force-structure plan for the Armed Forces based on an assessment by the Secretary of the probable threats to the national security during the six-year period beginning with the fiscal year for which the budget request is made and of the anticipated levels of funding that will be available for national defense purposes during such period.

(2) Such plan shall include, without any reference (directly or indirectly) to military installations inside the United States that may be closed or realigned under such plan—

(A) a description of the assessment referred to in paragraph (1);

(B) a description (i) of the anticipated force structure during and at the end of each such period for each military department (with specifications of the number and type of units in the active and reserve forces of each such department), and (ii) of the units that will need to be forward based (with a justification thereof) during and at the end of each such period; and

(C) a description of the anticipated implementation of such force-structure plan.

(3) The Secretary shall also transmit a copy of each such force-structure plan to the Commission.

(b) SELECTION CRITERIA.—(1) The Secretary shall, by no later than December 31, 1990, publish in the Federal Register and transmit to the congressional defense committees the criteria proposed to be used by the Department of Defense in making recommendations for the closure or realignment of military installations inside the United States under this part. The Secretary shall provide an opportunity for public comment on the proposed criteria for a period of at least 30 days and shall include notice of that opportunity in the publication required under the preceding sentence.

(2)(A) The Secretary shall, by no later than February 15, 1991, publish in the Federal Register and transmit to the congressional defense committees the final criteria to be used in making recommendations for the closure or realignment of military installations inside the United

States under this part. Except as provided in subparagraph (B), such criteria shall be the final criteria to be used, along with the force-structure plan referred to in subsection (a), in making such recommendations unless disapproved by a joint resolution of Congress enacted on or before March 15, 1991.

(B) The Secretary may amend such criteria, but such amendments may not become effective until they have been published in the Federal Register, opened to public comment for at least 30 days, and then transmitted to the congressional defense committees in final form by no later than February 15 of the year concerned. Such amended criteria shall be the final criteria to be used, along with the force-structure plan referred to in subsection (a), in making such recommendations unless disapproved by a joint resolution of Congress enacted on or before March 15 of the year concerned.

(c) DOD RECOMMENDATIONS.—(1) The Secretary may, by no later than April 15, 1991, April 15, 1993, and April 15, 1995, publish in the Federal Register and transmit to the congressional defense committees and to the Commission a list of the military installations inside the United States that the Secretary recommends for closure or realignment on the basis of the force-structure plan and the final criteria referred to in subsection (b)(2) that are applicable to the year concerned.

(2) The Secretary shall include, with the list of recommendations published and transmitted pursuant to paragraph (1), a summary of the selection process that resulted in the recommendation for each installation, including a justification for each recommendation.

(3) In considering military installations for closure or realignment, the Secretary shall consider all military installations inside the United States equally without regard

to whether the installation has been previously considered or proposed for closure or realignment by the Department.

(4) The Secretary shall make available to the Commission and the Comptroller General of the United States all information used by the Department in making its recommendations to the Commission for closures and realignments.

(d) REVIEW AND RECOMMENDATIONS BY THE COMMISSION.—(1) After receiving the recommendations from the Secretary pursuant to subsection (c) for any year, the Commission shall conduct public hearings on the recommendations.

(2)(A) The Commission shall, by no later than July 1 of each year in which the Secretary transmits recommendations to it pursuant to subsection (c), transmit to the President a report containing the Commission's findings and conclusions based on a review and analysis of the recommendations made by the Secretary, together with the Commission's recommendations for closures and realignments of military installations inside the United States.

(B) In making its recommendations, the Commission may make changes in any of the recommendations made by the Secretary if the Commission determines that the Secretary deviated substantially from the force-structure plan and final criteria referred to in subsection (c)(1) in making recommendations.

(3) The Commission shall explain and justify in its report submitted to the President pursuant to paragraph (2) any recommendation made by the Commission that is different from the recommendations made by the Secretary pursuant to subsection (c). The Commission shall transmit a copy of such report to the congressional defense

committees on the same date on which it transmits its recommendations to the President under paragraph (2).

(4) After July 1 of each year in which the Commission transmits recommendations to the President under this subsection, the Commission shall promptly provide, upon request, to any Member of Congress information used by the Commission in making its recommendations.

(5) The Comptroller General of the United States shall—

(A) assist the Commission, to the extent requested, in the Commission's review and analysis of the recommendations made by the Secretary pursuant to subsection (c); and

(B) by no later than May 15 of each year in which the Secretary makes such recommendations, transmit to the Congress and to the Commission a report containing a detailed analysis of the Secretary's recommendations and selection process.

(e) REVIEW BY THE PRESIDENT.—(1) The President shall, by no later than July 15 of each year in which the Commission makes recommendations under subsection (d), transmit to the Commission and to the Congress a report containing the President's approval or disapproval of the Commission's recommendations.

(2) If the President approves all the recommendations of the Commission, the President shall transmit a copy of such recommendations to the Congress, together with a certification of such approval.

(3) If the President disapproves the recommendations of the Commission, in whole or in part, the President shall transmit to the Commission and the Congress the reasons for that disapproval. The Commission shall then transmit to the President, by no later than August 15 of the year concerned, a revised list of recommendations for the closure and realignment of military installations.

(4) If the President approves all of the revised recommendations of the Commission transmitted to the President under paragraph (3), the President shall transmit a copy of such revised recommendations to the Congress, together with a certification of such approval.

(5) If the President does not transmit to the Congress an approval and certification described in paragraph (2) or (4) by September 1 of any year in which the Commission has transmitted recommendations to the President under this part, the process by which military installations may be selected for closure or realignment under this part with respect to that year shall be terminated.

SEC. 2904. CLOSURE AND REALIGNMENT OF MILITARY INSTALLATIONS

(a) IN GENERAL.—Subject to subsection (b), the Secretary shall—

(1) close all military installations recommended for closure by the Commission in each report transmitted to the Congress by the President pursuant to section 2903(e);

(2) realign all military installations recommended for realignment by such Commission in each such report;

(3) initiate all such closures and realignments no later than two years after the date on which the President transmits a report to the Congress pursuant to section 2903(e) containing the recommendations for such closures or realignments; and

(4) complete all such closures and realignments no later than the end of the six-year period beginning on the date on which the President transmits the report pursuant to section 2903(e) containing the recommendations for such closures or realignments.

(b) CONGRESSIONAL DISAPPROVAL.—(1) The Secretary may not carry out any closure or realignment recommended by the Commission in a report transmitted from the President pursuant to section 2903(e) if a joint resolution is enacted, in accordance with the provisions of section 2908, disapproving such recommendations of the Commission before the earlier of—

(A) the end of the 45-day period beginning on the date on which the President transmits such report; or

(B) the adjournment of Congress sine die for the session during which such report is transmitted.

(2) For purposes of paragraph (1) of this subsection and subsections (a) and (c) of section 2908, the days on which either House of Congress is not in session because of an ajournment of more than three days to a day certain shall be excluded in the computation of a period.

SEC. 2905. IMPLEMENTATION

* * * * *

(c) APPLICABILITY OF NATIONAL ENVIRONMENTAL POLICY ACT OF 1969.—(1) The provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall not apply to the actions of the President, the Commission, and, except as provided in paragraph (2), the Department of Defense in carrying out this part.

(2)(A) The provisions of the National Environmental Policy Act of 1969 shall apply to actions of the Department of Defense under this part (i) during the process of property disposal, and (ii) during the process of relocating functions from a military installation being closed or realigned to another military installation after the receiving installation has been selected but before the functions are relocated.

(B) In applying the provisions of the National Environmental Policy Act of 1969 to the processes referred to in subparagraph (A), the Secretary of Defense and the Secretary of the military departments concerned shall not have to consider –

(i) the need for closing or realigning the military installation which has been recommended for closure or realignment by the Commission;

(ii) the need for transferring functions to any military installation which has been selected as the receiving installation; or

(iii) military installations alternative to those recommended or selected.

(3) A civil action for judicial review, with respect to any requirement of the National Environmental Policy Act of 1969 to the extent such Act is applicable under paragraph (2), of any act or failure to act by the Department of Defense during the closing, realigning, or relocating of functions referred to in clauses (i) and (ii) of paragraph (2)(A), may not be brought more than 60 days after the date of such act or failure to act.

(d) WAIVER. – The Secretary of Defense may close or realign military installations under this part without regard to –

(1) any provision of law restricting the use of funds for closing or realigning military installations included in any appropriations or authorization Act; and

(2) sections 2662 and 2687 of title 10, United States Code.

The Administrative Procedure Act, 5 U.S.C. 704, provides:

Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

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No. 92-485

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

SEAN O'KEEFE, ACTING SECRETARY OF THE NAVY, ET AL.,

Petitioners

v.

ARLEN SPECTER, ET AL.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Bruce W. Kauffman
(Counsel of Record)
Mark J. Levin
Camille W. Spinello
DILWORTH, PAXSON, KALISH & KAUFFMAN
3200 Mellon Bank Center
1735 Market Street
Philadelphia, PA 19103
(215) 575-7000

Attorneys for Respondents

BEST AVAILABLE COPY

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA 19103 (215) 563-8000

TABLE OF CONTENTS

Page

Reasons for Denying the Petition 1

A. Considerations of Judicial Economy and Ripeness Support Denial of the Petition, Which Seeks Only Piecemeal Review of a Matter Remanded to the District Court for Decision on the Merits 1

B. Because Petitioners' Actions Were "Final" Within the Meaning of *Franklin*, There Is No Reason for the Third Circuit to Reconsider Its Decision, Which Is Entirely Consistent with This Court's 30-Year Precedent Concerning Judicial Review of Agency Action 2

Conclusion 10

TABLE OF AUTHORITIES

Cases: Page

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 3

Board of Governors of Federal Reserve System of U.S. v. MCorp Financial, Inc., 112 S. Ct. 459 (1991) 3

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986)..... 3, 7

Brotherhood of Locomotive Firemen and Enginemen v. Bangor & A.R. Co., 389 U.S. 327 (1967) 1

Cohen v. Rice, ____ F. Supp. ____, 1992 WL 246574 (D. Me., Sept. 18, 1992)..... 9

Colorado Environmental Coalition v. Lujan, ____ F. Supp. ____, 1992 WL 231020 (D. Colo., Sept. 14, 1992) 7

Franklin v. Massachusetts, 112 S. Ct. 2767 (1992) 1, 3-8

Leedom v. Kyne, 358 U.S. 184 (1958)..... 3

Statutes:

Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* 3, 5

Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808..... *passim*

Respondents respectfully submit this Brief in Opposition to the Petition for a Writ of Certiorari.[1]

REASONS FOR DENYING THE PETITION

A. Considerations of Judicial Economy and Ripeness Support Denial of the Petition, Which Seeks Only Piecemeal Review of a Matter Remanded to the District Court for Decision on the Merits

Petitioners expressly "do *not* seek plenary review" of the merits of the Third Circuit's decision "*at this time*". (Pet. at 10-11 n. 3) (emphasis added). *See also* Pet. at 8 ("we do not believe that plenary review is necessary *at this stage* of the proceedings") (emphasis added). Instead, they ask *only* that the Third Circuit be ordered to reconsider its decision – which resulted in remand of the case to the district court for adjudication on the merits – in light of the subsequently decided *Franklin v. Massachusetts,* 112 S. Ct. 2767 (1992). Because petitioners will likely seek plenary review of the Third Circuit's decision at some future time, this interlocutory petition should be denied to prevent delay and disruption of these injunctive proceedings, avoid fragmented and repetitive appeals and ensure an efficient and orderly appellate process. *See, e.g., Brotherhood of Locomotive Firemen and Enginemen v. Bangor & A.R. Co.,* 389 U.S.

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1. Respondents are United States Senators Arlen Specter, Harris Wofford, Bill Bradley and Frank R. Lautenberg; United States Representatives Curt Weldon, Thomas Foglietta, Robert E. Andrews, R. Lawrence Coughlin, Peter H. Kostmayer and Robert A. Borski; the Commonwealth of Pennsylvania and its Governor Robert P. Casey and Attorney General Ernest D. Preate, Jr.; the State of New Jersey and its Governor James J. Florio and Attorney General Robert J. Del Tufo; the State of Delaware and its Governor Michael N. Castle; the City of Philadelphia; the International Federation of Professional and Technical Engineers, Local 3; the Metal Trades Council, Local 687 Machinists; Planners Estimators Progressman & Schedulers Union, Local No. 2; and Union representatives William F. Reil, Howard J. Landry and Ronald Warrington.

327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied.").

B. Because Petitioners' Actions Were "Final" Within the Meaning of *Franklin*, There Is No Reason for the Third Circuit to Reconsider Its Decision, Which Is Entirely Consistent with This Court's 30-Year Precedent Concerning Judicial Review of Agency Action

The Defense Base Closure and Realignment Act of 1990 (the "Act") was expressly enacted to provide a "*fair process*" for closure and realignment of United States military installations. §2901(b) (emphasis added). Petitioners made a mockery of this congressional mandate by predetermining, on an intentionally incomplete administrative record and without required public hearings, that the Philadelphia Naval Shipyard ("Shipyard") should be closed, resulting in the loss of nearly 50,000 jobs. In particular:

- The Act requires the Secretary of Defense to "consider all military installations . . . equally without regard to whether the installation has been previously considered or proposed for closure." §2903(c)(3). Nevertheless, the Navy compiled a "stealth list" of base closings from a prior base closure list and attempted to manipulate the base closure criteria to close the Shipyard. When those efforts failed, the Navy excluded all shipyards other than Philadelphia from consideration to justify its predetermination that Philadelphia should be closed.

- The Act requires the Secretary of Defense to "make available to the [Defense Base Closure and Realignment] Commission and the Comptroller General of the United States all information used by the Department in making its recommendations to the Commission for closures and realignments."

§2903(c)(4); *see also* §2903(d)(5). Nevertheless, the Navy made a conscious decision to disable the General Accounting Office ("GAO") from performing its statutory duties by withholding key information. The GAO concluded that it could not even analyze the Navy's closure recommendations because of this lack of documentation.

• The Act requires the Commission to conduct public hearings on the recommendations for closure and realignment. §2903(d)(1). Nevertheless, all information favorable to the Shipyard was suppressed from the public. The Commission also conducted closed-door meetings with the Navy after the close of public hearings for the purpose of gathering information critical to its decision to close the Shipyard.

The Third Circuit's holding that there is federal jurisdiction to review petitioners' blatant failure to comply with the procedural mandates of the Act is totally consistent with this Court's established precedent governing judicial review of agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq. See, e.g., Board of Governors of Federal Reserve System of U.S. v. MCorp Financial, Inc.,* 112 S. Ct. 459, 460 (1991); *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 670-71 (1986); *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140-41 (1967); *Leedom v. Kyne,* 358 U.S. 184, 190 (1958); *see also Franklin,* 112 S. Ct. at 2783-86 (Stevens, J., concurring). As emphasized in *Bowen, supra*, 476 U.S. at 670-71:

> "We begin with the *strong presumption* that Congress intends judicial review of administrative action. From the beginning 'our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was

> the purpose of Congress.' [citations omitted]. In *Marbury v. Madison*, 1 Cranch 136, 163, 5 U.S. 137, 163, 2 L. Ed. 60 (1803), a case itself involving review of executive action, Chief Justice Marshall insisted that '[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws.'
>
> * * *
>
> Committees of both Houses of Congress have endorsed this view. In undertaking the comprehensive rethinking of the place of administrative agencies in a regime of separate and divided powers that culminated in the passage of the [APA], the Senate Committee on the Judiciary remarked:
>
> '*Very rarely* do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be *blank checks* drawn to the credit of some administrative officer or board.' S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)." (Pet. App. at 13a-14a) (emphasis in original).

After scrutinizing the language and legislative history of the Act, the very purpose of which is to provide a "fair process" for base closures, the Third Circuit concluded that Congress did not intend to immunize petitioners' patently unfair process from federal court review. (Pet. App. at 4a-7a, 26a-27a).

While virtually conceding the correctness of the Third Circuit's decision on the merits, petitioners nevertheless contend that their flagrant *procedural* violations of the Act, which indisputably have been finally completed, are totally shielded from review because, under *Franklin*, their discretionary administrative decisionmaking is not a "final" agency action. Petitioners,

however, cannot take refuge in *Franklin* because it is factually and legally inapposite.

First, plaintiffs in *Franklin* challenged decisions made by both the President and the Secretary of Commerce. This Court held that under the particular statutes involved, it was the decision of the President, not the Secretary, that was "final" for purposes of judicial review. 112 S. Ct. 2773, *citing* 5 U.S.C. §704. In complete contrast to *Franklin*, where the President was actually joined as a party defendant and relief was entered against him, *id.* at 2770, respondents here do *not* seek review of the merits of any presidential decision or exercise of discretion, nor do they seek any relief from or involving the President, who is not a party.[2] Moreover, respondents do *not* challenge the exercise of the agencies' discretion under the APA, but only the *integrity of the process* by which petitioners arrived at their decision to close the Shipyard. There is no other procedure for reviewing the agencies' compliance with the procedural mandates of Congress.

Second, the statute in *Franklin* imposed no procedural requirements on the Secretary of Commerce, and the Secretary's report to the President carried "no direct consequences" and had "no direct effect". *Id.* at 2774. In the present case, however, *only* the agencies are subject to the procedural requirements which are the raison d'etre of the Act,[3] and whether they have complied with

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2. Petitioners concede this at page 5 of their Petition: "Respondents asked the district court . . . to enjoin the *Department of Defense* 'from taking any action based upon the list of closure and realignment proposals submitted by the *Secretary of the Navy*' ". (Emphasis added).

3. In *Franklin*, the Secretary's report to the President was deemed an "unusual candidate" for agency action because it was not promulgated to the public in the Federal Register and no official administrative record was generated. 112 S. Ct. at 2773. By contrast, in the present case, the agencies' proceedings are required to be made public and public hearings are mandated. §§2902(e)(2)(A), 2903(d)(1).

those critical requirements directly and materially affects the President's decision. As the Third Circuit emphasized:

> "[T]he fact that some aspects of a decisionmaking process are determined to be not subject to judicial review does not absolve the courts from the responsibility of determining whether a clear congressional intention to preclude review exists with respect to other aspects of that same process. *There are a number of statutes, for example, in which Congress has clearly intended that there be no review of the ultimate exercise of the agency's discretion, but, at the same time, has anticipated judicial review of compliance with its procedural mandates* concerning the process leading up to the ultimate discretionary decision.
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> * * *
>
> In this context, it is important to note that while Congress did not intend courts to second-guess the Commander-in-Chief, it did intend to establish exclusive means for closure of domestic bases. §2909(a). With two exceptions, Congress intended that domestic bases be closed *only* pursuant to an exercise of presidential discretion *informed by recommendations of the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base.* Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a *specific procedure* that would ensure balanced and informed advice to be considered by the President and by Congress before the executive and legislative judgments were made." (Pet. App. at 19a-20a) (footnote omitted; emphasis added and in original).

. Under the Act, no procedural requirements are imposed upon the President, who is given only a scant 15 days to review the Commission's report. His sole function is to accept or reject the closure recommendations. *The President relies exclusively on the recommendations of the petitioner agencies*, and the legitimacy of those recommendations hinges entirely on the agencies' adherence to the mandated procedural safeguards. For the base closure process to function as Congress intended, and for the President's decision to be responsible, the Act's procedural mandates must be complied with at the *agency* level. Therefore, the agencies' actions with regard to compliance with procedural mandates must be deemed "final" for purposes of judicial review. *See Franklin*, 112 S. Ct. at 2773 ("[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties").

Petitioners' strained and hypertechnical interpretation of *Franklin* would place them above the law. Denial of judicial review in this case would not only thwart the will of Congress as expressed in the Act and its legislative history, but would effectively issue blank checks to the bureaucracy in a wide range of future cases to disclaim any accountability to Congress, the courts and the public. Such an unsalutary result could not have been intended by this Court in *Franklin*. Indeed, to apply *Franklin* in the sweeping manner urged by petitioners would eviscerate the 30 years of pre-*Franklin* precedent sustaining judicial review of agency action.

Consistent with the principle that statutes should only "very rarely" be interpreted to withhold judicial review,[4] the court in *Colorado Environmental Coalition v. Lujan*, ____ F. Supp. ____, 1992 WL 231020 (D. Colo., Sept. 14, 1992), recently declined to read *Franklin* as retreating from or overturning this Court's prior judicial review decisions, which are firmly embedded in

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4. *See Bowen*, *supra*, 476 U.S. at 670-71.

the fabric of American jurisprudence. There, plaintiffs alleged that the Secretary of the Interior violated the procedural requirements of the National Environmental Policy Act ("NEPA") in recommending to the President areas that should receive wilderness protection. Although defendant argued that under *Franklin* there was no "final" agency action because the President made the ultimate decision, the court held that the agency's actions were final and reviewable since plaintiffs sought no relief from the President and there was no other procedure for reviewing the agency's conduct:

> "Once the recommendations are sent to the President based on inadequate procedures in violation of NEPA, there will be no opportunity for any other recommendation by the Secretary as to the wilderness study areas in question. Therefore, the court concludes that . . . the challenged agency action is final.
>
> * * *
>
> Defendant argues that there is no final agency action in this case until the President makes and transmits his recommendations for wilderness designation to Congress, therefore, the action complained of is not reviewable under the APA, citing *Franklin v. Massachusetts*. . . . The court disagrees. The Plaintiffs here seek no relief from the President. The challenged action is the Secretary's decision not to prepare a SEIS pursuant to NEPA. . . . The court concludes that the Secretary's decision . . . is final agency action subject to review under the APA."

Virtually identical considerations inexorably compel the same conclusion here. Under the Act, neither the President nor Congress is given the responsibility of ensuring a fair process. *That paramount and expressly mandated duty is imposed directly and solely upon petitioners, and it is the conduct of petitioners — not that of the President — that respondents challenge.* If

the federal courts are prevented from reviewing petitioners' abject failure to comply with the procedural requirements of the Act, *no review of that unlawful conduct will ever be possible.* Because the purpose of the Act is to ensure a "fair process" for base closures, the only method of ensuring the fulfillment of Congress' mandate is to permit judicial review of the actions of the *only* governmental body charged with procedural obligations.[5]

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5. The recent dismissal by a district court of another base closure lawsuit in light of *Franklin* was clearly erroneous. *See Cohen v. Rice*, ____ F. Supp. ____, 1992 WL 246574 (D. Me., Sept. 18, 1992). The *Cohen* court only briefly and superficially focused on the critical distinction between procedural and substantive challenges to agency actions under the Act. Moreover, although it admitted there was "no clear evidence of congressional intent to preclude all judicial review of actions taken pursuant to the . . . Act," it simply ignored this Court's mandate that judicial review *must* be permitted in such circumstances. The *Cohen* court also disregarded the undesirable consequences of its decision, which will encourage agencies to flout congressional mandates and place themselves beyond the reach of law.

CONCLUSION

For each of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Bruce W. Kauffman
(Counsel of Record)
Mark J. Levin
Camille W. Spinello
DILWORTH, PAXSON, KALISH
& KAUFFMAN
3200 Mellon Bank Center
1735 Market Street
Philadelphia, PA 19103
(215) 575-7000

Attorneys for Respondents

(3)

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In the Supreme Court of the United States

OCTOBER TERM, 1992

SEAN O'KEEFE, ACTING SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

ARLEN SPECTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

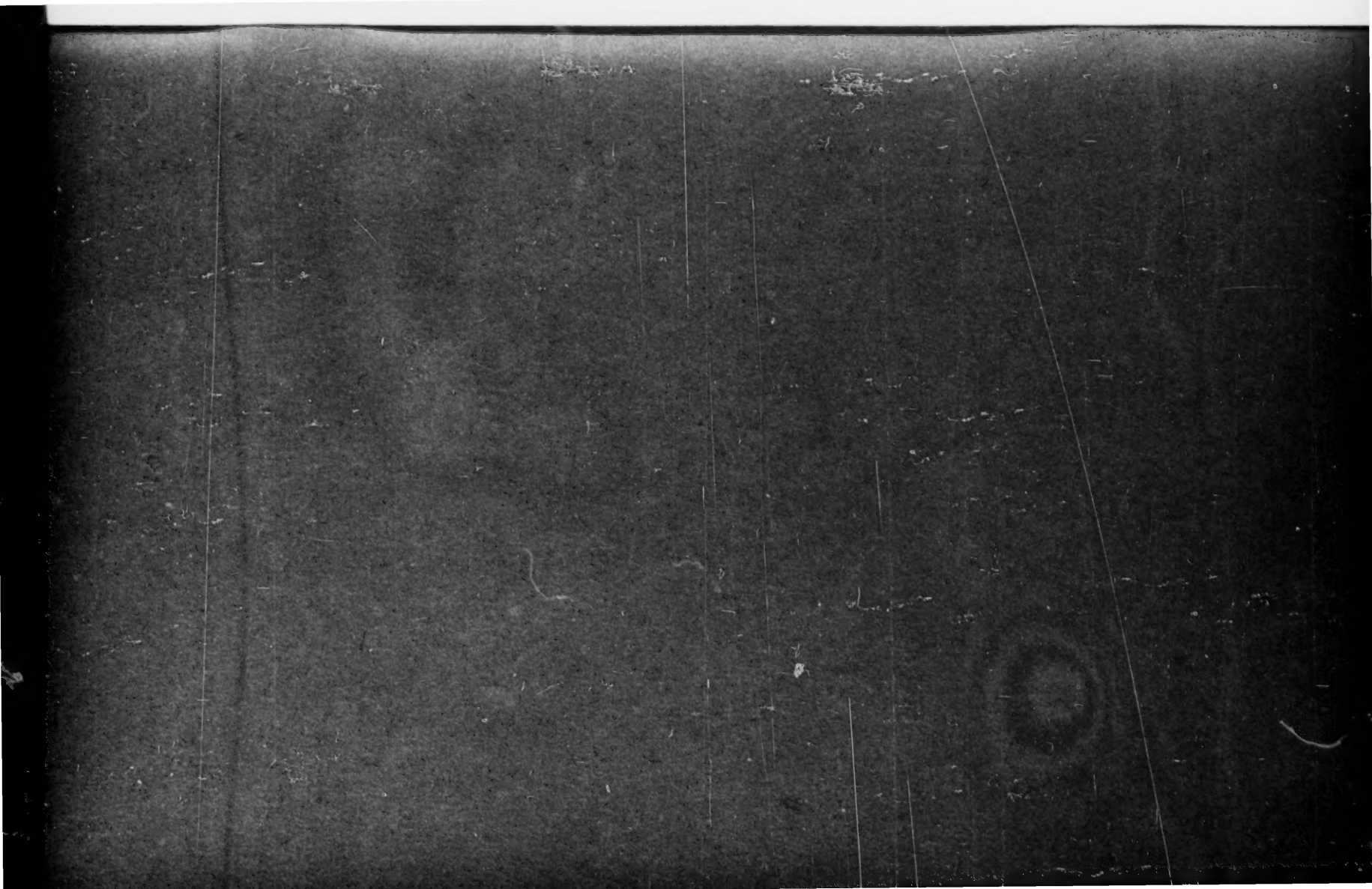

TABLE OF AUTHORITIES

Cases:	Page
Abbott Laboratories v. *Gardner*, 112 S. Ct. 136 (1967)	6
Cohen v. *Rice*, Civ. No. 91-0282-B (D. Me. Sept. 18, 1992)	2, 4, 7, 1a
Franklin v. *Massachusetts*, 112 S. Ct. 2767 (1992)	1, 5, 6, 8
Henry v. *City of Rock Hill*, 376 U.S. 776 (1964)	3
Statutes:	
Administrative Procedure Act, 5 U.S.C. 704	1
Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808:	
§ 2903(d), 104 Stat. 1811	5
§ 2903(e)(2), 104 Stat. 1812	5
§ 2903(e)(3), 104 Stat. 1812	5-6
§ 2903(e)(5), 104 Stat. 1812	6
§ 2904(b), 104 Stat. 1813	6
§ 2908, 104 Stat. 1816-1817	6
2 U.S.C. 2a(a)	6
13 U.S.C. 141(a)	6
13 U.S.C. 141(b)	6
Miscellaneous:	
R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986)	3

In the Supreme Court of the United States

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

After the court of appeals issued its decision in this case and denied the government's petition for rehearing, this Court issued its decision in *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992). As we explain in our petition for certiorari (Pet. 8-10), *Franklin* casts serious doubt on the court of appeals' ruling that, whether or not there is "final agency action" in this case subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 704, the President's actions are subject to review under the common law to the same extent that agency actions are subject to review under the APA. Indeed, another court recently entered judgment for the government on the basis of *Franklin* in a separate action chal-

lenging the decision to close Loring Air Force Base. *Cohen* v. *Rice*, Civ. No. 91-0282-B (D. Me. Sept. 18, 1992).[1] Because the court of appeals has not had an opportunity to consider the significance of *Franklin*, it is appropriate to grant the petition for certiorari, vacate the court of appeals' decision, and remand for further consideration in light of that decision.

1. Respondents contend (Br. in Opp. 1) that judicial economy would be served by denying the petition for certiorari. That is not so. This Court's decision in *Franklin* may well dispose of this case, as it recently disposed of similar litigation in *Cohen* v. *Rice*, *supra*. Consequently, a remand to allow the court of appeals to consider *Franklin* is the most efficient way to proceed with this litigation. Respondents incorrectly assert (Br. in Opp. 1) that a remand to the court of appeals will cause "delay and disruption" and "fragmented and repetitive appeals." On the contrary, delay and repetitive appeals are likely if this case is returned directly to the district court without allowing the court of appeals to consider the significance of *Franklin*. Denial of the petition for certiorari might well lead to a lengthy and wholly unnecessary trial, followed by a second round of appellate litigation. That result hardly promotes judicial economy.

Respondents suggest (Br. in Opp. 1) that certiorari should be denied because the government has not sought plenary review in this Court and "will likely seek plenary review of the Third Circuit's decision at some future time." But the government is not seeking plenary review precisely because we believe that a

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[1] The court's opinion is reprinted as an appendix to this brief.

remand to the court of appeals is the most expeditious way to resolve this litigation.

Respondents assume that it makes no difference whether this litigation is resolved sooner rather than later. But time is of the essence in this case. The court of appeals' decision jeopardizes the Act's insistence on speed and finality by opening the door to the type of delaying tactics that effectively blocked base closures prior to enactment of the Act. In addition, the court's decision allows private parties—including individual legislators who fail to accomplish their objectives through the legislative process—to seek to remove individual bases from the "package" agreed upon by the President and Congress. See Pet. 10 n.3; Pet. App. 49a-51a (Alito, J., concurring in part and dissenting in part). If respondents succeed in prolonging this litigation, they may substantially interfere with the second round of base closure decisions under the Act in 1993.

Respondents err in suggesting (Br. in Opp. 1-2) that the *Franklin* issue is not ripe for review by this Court. "[W]here * * * there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.18, at 225 (6th ed. 1986) (collecting cases). Because *Franklin* may dispose of this case, a remand to the court of appeals to consider that intervening decision is entirely appropriate. See *Henry* v. *City of Rock Hill*, 376 U.S. 776, 777 (1964) (summary reconsideration order appropriate where intervening

precedent is "sufficiently analogous and, perhaps, decisive").[2]

2. Respondents contend (Br. in Opp. 5-9) that this Court's decision in *Franklin* is "factually and legally inapposite." Br. in Opp. 5. As the recent decision in *Cohen* v. *Rice*, *supra*, attests, however, *Franklin* is highly relevant and may well be dispositive. See App., *infra*, 1a-13a. Respondents' arguments to the contrary are wholly unconvincing.

First, respondents assert (Br. in Opp. 5) that "[i]n complete contrast to *Franklin*, where the President was actually joined as a party defendant and relief was entered against him, * * * respondents here do *not* seek review of the merits of any presidential decision or exercise of discretion, nor do they seek any relief from or involving the President, who is not a party." The court of appeals flatly disagreed with respondents' characterization of the relief they are seeking:

> While the statutory and constitutional violations alleged here result from actions or omissions of the Commissioner and the Secretary of Defense * * *, the alleged injury to the plaintiffs did not occur but for a decision of the President and it is from that decision that the plaintiffs necessarily seek relief; it is the implementation of the President's decision that we have been asked to enjoin.

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[2] Respondents' assertion (Br. in Opp. 4) that petitioners "virtually conced[e] the correctness of the Third Circuit's decision on the merits" is incorrect. The petition states (Pet. 10-11 n.3) that "the court of appeals * * * erred in concluding that the 1990 Act does not preclude judicial review of 'procedural' claims," but explains that petitioners do not seek plenary review of that issue at this time because the Court's decision in *Franklin* may well be dispositive.

Pet. App. 15a. Thus, this case is quite similar to *Franklin*.[3] Even if respondents had chosen not to seek relief "involving the President," that choice would have no bearing on the question whether recommendations of the Secretary and the Commission under the Base Closure Act, Pub. L. No. 101-510, 104 Stat. 1808, are final agency action under the APA.

Second, respondents assert that the report of the Base Closure Commission, unlike the census report of the Secretary of Commerce in *Franklin*, has "direct consequences" and a 'direct effect." Br. in Opp. 5 (quoting *Franklin*, 112 S. Ct. at 2774). But the Base Closure Commission's report, like the Secretary's report in *Franklin*, takes effect only if accepted by the President. If anything, the absence of direct consequences is even clearer in this case than it was in *Franklin*. No statute expressly authorizes the President to alter the census, and the President's apportionment calculation is "admittedly ministerial." 112 S. Ct. at 2775. In contrast, the Base Closure Act expressly provides that the President may approve or disapprove the Commission's recommendations in whole or in part. § 2903(e)(2), 104 Stat. 1812. (The recommendations of the Secretary of Defense may be accepted or rejected by the Commission, and therefore are even more tentative in nature than the Commission's recommendations. § 2903(d), 104 Stat. 1811.) If the President disapproves the recommendations, the Comission must prepare revised recommendations and resubmit them to the President. § 2903

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[3] In *Franklin*, the appellees—like the respondents in this case—asserted (91-1502 Br. 113 n.36) that "no action or omission by the President or his staff has ever been called into question or otherwise put at issue in this litigation."

(e)(3), 104 Stat. 1812. If the President disapproves the revised recommendations, the base closure process is terminated for that year. § 2903(e)(5), 104 Stat. 1812. There is thus no basis whatever for respondents' bold assertion that the President "relies exclusively on the recommendations of the petitioner agencies." Br. in Opp. 7 (emphasis omitted).[4]

Finally, respondents contend (Br. in Opp. 5) that *Franklin* is inapposite because "the statute in *Franklin* imposed no procedural requirements on the Secretary of Commerce," while the statute at issue in this case imposes such requirements. In fact, the census statutes at issue in *Franklin* imposed requirements analogous to the requirements at issue in this case. See, *e.g.*, 13 U.S.C. 141(a) (requiring the Secretary of Commerce to take a census as of the first day of April of every tenth year); 13 U.S.C. 141(b) (requiring the Secretary to complete the tabulation of population and report to the President within nine months after the census date); 2 U.S.C. 2a(a) (requiring the President to transmit to Congress a statement of the population of each State and to apportion representatives according to the "method of equal proportions"). In any event, the Court's analysis in *Franklin* turned on whether the agency action at issue had a "sufficiently direct and immediate" impact, 112 S. Ct. at 2773 (quoting *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 152 (1967)), not on whether a

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[4] The Base Closure Act also provides for congressional review of the President's decision. §§ 2904(b), 2908, 104 Stat. 1813, 1816-1817. The House of Representatives defeated a proposed resolution of disapproval by a vote of 364 to 60 after hearing allegations—presented by several of the respondents—that the procedures by which the Philadelphia Shipyard was recommended for closure were invalid. See Pet. 4.

plaintiff's challenge to the action could be characterized as "procedural" rather than "substantive." As the court explained in *Cohen* v. *Rice*, *supra*, "[p]ermitting judicial review of an intermediate step in the process, even on purely procedural grounds, would be inconsistent with *Franklin* and would ignore the limitation imposed by the APA." App., *infra*, 13a.

3. In the course of responding to *Franklin*, respondents allege (Br. in Opp. 2) that petitioners "made a mockery" of the process established by the Base Closure Act. We believe respondents' allegations are without foundation, but in any event their allegations are irrelevant to the question presented in the petition, which is whether the actions of the President, the Commission, or the Secretary of Defense are "final agency action" within the meaning of the APA.[5]

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[5] Respondents allege (Br. in Opp. 2-3) that: (1) the Navy "compiled a 'stealth list' of base closings from a prior base closure list," "attempted to manipulate the base closure criteria," and "excluded all shipyards other than Philadelphia from consideration"; (2) "the Navy made a conscious decision to * * * withhold[] key information" from the General Accounting Office (GAO); and (3) "all information favorable to the Shipyard was suppressed from the public," and the "Commission * * * conducted closed-door meetings with the Navy." Respondents fail to mention that the court of appeals has already held that these allegations are largely beyond the reach of judicial review. See Pet. App. 27a-34a. Moreover, we believe the facts to be as follows: (1) the Navy and the Secretary of Defense "considered all military installations equally without regard to whether the installation had been previously considered or proposed for closure or realignment," C.A. App. 215; (2) "[t]he Navy provided the GAO with whatever documentation of its decision-making process that was available," *id.* at 217; and (3) "[a]ll meetings of the Commis-

For the foregoing reasons, and those set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the cause remanded for further consideration in light of *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992).

Respectfully submitted.

KENNETH W. STARR
Solicitor General

OCTOBER 1992

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sion were open to the public," and "[a]ll unclassified information received by the Commission was available for public review at all times," *id.* at 220. Neither the district court nor the court of appeals had occasion to resolve the factual disputes over respondents' allegations.

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 91-0282-B

SEN WILLLIAM S. COHEN, ET AL., PLAINTIFFS

v.

DONALD RICE, SECRETARY OF THE AIR FORCE, ET AL., DEFENDANTS

ORDER AND MEMORANDUM OF OPINION

[Filed Sept. 18, 1992]

BRODY, District Judge

This action for a declaratory judgment and injunctive relief is before the Court on Defendants' Motion for Summary Judgment. The Plaintiffs allege that they were injured by the failure on the part of the Secretaries of the Air Force and Defense and the Base Closure and Realignment Commission ("Base Closure Commission" or the "Commission") to act pursuant to the statutory requirements delineated in the Base Closure Act ("Base Closure Act" or the "Act"), Pub. L. No. 101-510, 104 Stat 1808 (1990). Plaintiffs seek to enjoin the Secretary of Defense and the Secretary of the Air Force from carrying out the

decision to close Loring Air Force Base ("Loring" or the "Base"), and from taking any actions that may interfere with the ability of Loring to operate as though it were not scheduled for closure. Plaintiffs also request that the Court declare: (i) that the realignment recommendation to close Loring, provided by the Secretaries of the Air Force and Defense, was developed in a manner inconsistent with the requirements of the Base Closure Act; (ii) that the Secretaries' adoption of the closure findings, conclusions and recommendations made by the Air Force with respect to the decision to close Loring was arbitrary and capricious and otherwise not in conformity with law; (iii) that the closure and realignment recommendations submitted by the Commission to the President with respect to Loring were made in violation of the Act; and (iv) that the Commission's adoption of the list of closure and realignment findings, conclusions and recommendations made by the Air Force with respect to the decision to close Loring was arbitrary and capricious and not otherwise in conformity with law.

Agency actions, such as actions by the Secretary of Defense and the Base Closure Commission, may be the subject of judicial review if they fall within the purview of the Administrative Procedure Act ("APA"). 5 U.S.C. § 701 *et seq.* Plaintiffs acknowledge that substantive decisions made under the Base Closure Act are not subject to judicial review under the APA because such decisions are made by the President and, therefore, are not agency action. However, Plaintiffs assert that the procedures by which the Secretary of Defense and the Commission make recommendations to the President, under the Base Closure Act, are subject to judicial review under the

APA. Based on the U.S. Supreme Court's June 26, 1992 decision in *Franklin v. Massachusetts*, which discusses the parameters of final agency action, this Court is satisfied that the procedures by which the President receives recommendations from the Base Closure Commission and the Secretary of Defense can not be considered "final agency action" under the APA. Therefore, such procedures are not subject to judicial review. Accordingly, Defendants' motion is *GRANTED.*

I. BACKGROUND

A. *The Complaint*

This controversy revolves around the decision to close Loring. Loring, which is located in Limestone, Maine, is one of twenty-one Strategic Air Command Bases maintained by the Air Force in the continental United States. In April 1991, pursuant to the Base Closure Act, the Secretary of Defense recommended that fourteen Air Force facilities, including Loring, be closed and that six be realigned. *See* 56 Fed. Reg. 15184 (April 15, 1991). Thereafter, the Base Closure Commisssion engaged in an analysis and review of the Secretary's recommendations. The Commission ultimately recommended that one of the Air Force facilities recommended for closure by the Secretary remain open, but concurred with the Secretary's recommendation that Loring be closed.

On July 10, 1991, President Bush approved the recommendations of the Commission. *See* 27 Weekly Comp. Pres. Doc. 930 (July 15, 1991). Following the President's approval, the House and Senate Armed Services Committees held hearings on the Commission's recommendations.

On July 30, 1991, as permitted by Section 2908 of the Act, the House considered a resolution, sponsored by Congressional plaintiff Rep. Snowe, to disapprove the Commission's recommendations. *See* 137 Cong. Re. H6006 (daily ed. July 31, 1991). The House entertained floor debate on the proposal, including the objections of Rep. Snowe which parallel the allegations set forth here. *Id.* By a vote of 364 to 60, the House rejected the proposal, thus permitting the closure and realignment process to continue. *See* 137 Cong. Re. H6039.

Having exhausted their remedies in the political arena, the plaintiffs, United States Senators William S. Cohen and George J. Mitchell, United States Representative Olympia J. Snowe, Governor John R. McKernan, Jr., the Towns of Limestone, Ashland, Caswell, Fort Fairfield, Mars Hill, New Sweden, Van Buren, the Cities of Caribou and Presque Isle, Aroostook County, the Save Loring Committee, the American Federation of Government Employees Local Union Chapter # 2943 and Alan Mulherin, brought their challenge to the Court.

B. *Procedural Posture*

Defendants moved to dismiss the Plaintiffs' complaint on February 28, 1992. On May 20, 1992 the Court issued an order denying the motion in part and granting it in part. Specifically, the Court dismissed Plaintiffs' claims which focused on alleged deficiencies in the performance of the Secretaries of the Air Force and Defense. The Court stated that deficiencies in this category were not judicially reviewable because the Secretaries' recommendations are clearly committed to their discretion under the

Act and because Congress provided for alternative methods of review for the Secretaries' recommendations. Order and Mem. at 9-10 (May 20, 1992). In addition, the Court dismissed Plaintiffs' challenges to the decision-making process by which the Commission reviewed the Secretary of Defense's recommendations, finding that these challenges, like the challenges to the recommendations of the Secretaries, were not subject to second guessing by the judiciary. Order and Mem. at 11 (May 20, 1992). However, the Court denied Defendants' Motion to Dismiss with regard to Plaintiffs' claims that the Secretary of Defense failed to transmit to the General Accounting Office ("GAO"), members of Congress and the Commission all the information used in making the base closure recommendations in question. The Court also denied the Defendants' Motion to Dismiss with regard to the Plaintiffs' assertion that the Commission failed to hold public hearings as required by the Act. In denying the Defendants' motion on these claims, the Court adopted the reasoning of the Third Circuit in *Specter v. Garrett*, No. 91-1932, 1992 U.S. App. LEXIS 6969, (3rd Cir. April 17, 1992). The Court denied Defendants' motion in part, finding no clear congressional intent under the Base Closure Act to preclude judicial review of the Plaintiffs' claims under the APA. Subsequent to this Court's order on Defendant' Motion to Dismiss, the Supreme Court's interpretation of reviewable final agency action under the APA was handed down in *Franklin v. Massachusetts*, 60 U.S.L.W. 4781 (No. 91-1502, slip op. June 26, 1992). In light of *Franklin*, the Court is satisfied that Plaintiffs' remaining claims must now be dismissed. *Franklin* clearly holds that the APA does not provide a mechanism for judicial review in this context.

C. *The Administrative Procedure Act*

The APA sets forth the procedures by which federal agencies are held accountable to the public and their actions subject to review by the courts. The APA provides that any "person . . . aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof." 5 U.S.C. § 702. The APA provides that the reviewing court will "set aside agency action . . . found to be . . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law; . . . contrary to constitutional right . . .; [or] without observance of the procedure required by law." 5 U.S.C. § 706(2). Review under the APA is available, however, only "to the extent that . . . statutes [do not] preclude judicial review" and the agency action "is [not] committed to agency discretion by law." 5 U.S.C. § 701(a). In addition, the APA is available only for review of "*final agency action* for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (emphasis added).

D. *The Base Closure Act*

In this case the Plaintiffs seek to apply the APA to actions taken pursuant to the Base Closure Act. The Defense Base Closure and Realignment Act of 1990 is the latest in a series of statutes enacted by Congress during the past fifteen years to regulate the process by which domestic military bases are closed and realigned. Section 2901 of the Act declares that the law's purpose is to provide a fair process that will result in the timely closure and realignment of military installations inside the United States. § 2901(b).

Under the Act, the Secretary of Defense must submit to Congress, as part of the Defense Department's budget justification documents, a force-structure plan with recommendations for the closure and realignment of military installations. § 2903(a)-(b). The Act requires the Secretary to publish in the Federal Register and transmit to the congressional defense committees the criteria to be used by the Department of Defense in making recommendations for installation closures. § 2903(b)(2)(A).

In addition, the Act establishes a Commission of eight members to be appointed by the President with the advice and consent of the Senate. § 2902(c). The Commission receives the Secretary's recommendations and, after conducting public hearings on them, must transmit to the President a report containing the Commission's findings and conclusions based on its review and analysis of the Secretary's recommendations. § 2903(d).

The Act provides that the Commission is to be assisted in its task by the GAO. The Secretary must give the GAO all the information used in making its initial recommendations in order to facilitate the GAO's review. § 2903(c)(4). The GAO must report on the Secretary's recommendations to the Congress and to the Commission. § 2903(d)(5).

Once the Commission has transmitted its recommendations to the President, the President may approve or disapprove the Commission's recommendations in whole or in part, and must transmit that determination to the Commission and to Congress. § 2903(e)(2)(3). If the President approves the Commission's recommendations, Congress has 45 days from the date of this approval to pass a joint resolution disapproving of the recommendations in their en-

tirety. §§ 2904(b), 2908. If such a resolution is enacted, the Secretary of Defense may not close the bases approved for closure by the President. § 2904(b).

If the President disapproves of the Commission's recommendations in whole or in part, the recommendations must be returned to the Commission with the reasons for the disapproval. § 2903(e)(1)-(3). The Commission must then reconsider its recommendations in light of the President's actions and submit a revised list for the President's consideration. § 2903(e)(3). If the President does not transmit an approved list of recommendations to Congress by September 1 of the year in which the Commission has transmitted recommendations, the base closure process for that year is terminated. § 2903(e)(5).

E. *The Nature of Relief Sought by the Plaintiffs*

The Plaintiffs seek a remand of the recommendation to close Loring to the Commission to correct the process under which the recommendation was promulgated. The Plaintiffs note that the effect of such a remand on the decision of the President cannot be determined until after the Commission has reconsidered its actions. Pls.' Response Defs.' Mot. Summ. J. at 10.

II. SUMMARY JUDGMENT STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In light of the Supreme Court's hold-

ing in *Franklin v. Massachusetts*, it is clear that the actions the Plaintiffs complain of do not constitute final agency action under the APA. Because there is no final agency action, there is no legal basis under which Plaintiffs' factual allegations can be reviewed.

III. DISCUSSION

While this Court and the Third Circuit in *Specter* found no clear evidence of congressional intent to preclude all judicial review of actions taken pursuant to the Base Closure Act, the issue of whether there had been final agency action was not specifically addressed. In *Franklin*, the State of Massachusetts challenged the Secretary of Commerce's inclusion of military personnel serving overseas for census purposes. 60 U.S.L.W. 4781 (No. 91-1502, slip op. June 26, 1992). For only the second time since 1900, the Secretary of Commerce allocated the Department of Defense's overseas employees to particular states. The Secretary counted these employees as residents of their "home of record", as designated in their personnel files. This allocation altered the relative state populations enough to shift the apportionment of Representatives which, under the Constitution, must be based on the "actual Enumeration of persons in each State." Art. I, § 2, cl. 3; Amdt. 14, § 2.

The statutory scheme which fulfills this constitutional command creates an interlocking set of responsibilities for the Secretary of Commerce and the President. This interlocking set of responsibilities is comparable to those of the President, the Base Closure Commission and the Secretary of Defense under the Base Closure Act. Under the apportionment statutes, the Secretary of Commerce is required to take a decennial census of the population and report the col-

lected information to the President. 13 U.S.C. § 141(a)-(b). The President then sends Congress a statement, based upon data from the decennial census, showing the number of persons in each State and the number of Representatives to which each state would be entitled under an "apportionment of the then existing number of Representatives by the method known as the method of equal proportions . . . ." 2 U.S.C. § 2a(a).

In *Franklin*, the President's acceptance of the Secretary's allocation of overseas military personnel to their home of record, approved of an apportionment scheme which altered state populations enough to shift a Representative from Massachusetts to the State of Washington. Massachusetts and two of its registered voters brought suit against the Secretary of Commerce, among others, challenging the allocation of the overseas personnel as arbitrary and capricious under the APA. Under these facts, the *Franklin* court held that there was no final agency action subject to review. 60 U.S.L.W. at 4784. The *Franklin* court applied *Abbott Laboratories v. Gardner*, which states that one must look to whether the impact of agency action is "sufficiently direct and immediate" to determine whether such an action is final. 387 U.S. 136, 152 (1967). Applying the *Abbott* test, the *Franklin* court held that the "Secretary of Commerce's report to the President carries no direct consequences for the reapportionment [and, therefore,] it serves more like a tentative recommendation than a final and binding determination." 60 U.S.L.W. at 4784. Because no statute prohibited the President from rejecting the Secretary of Commerce's report, and because no statute ruled out an instruction by the President to the Secretary to reform the census, the

Supreme Court held that the ruling of the Secretary of Commerce was similar to the ruling of a subordinate official and, therefore, not final agency action. *Id.*

In *Abbott*, the Court found final agency action when an agency promulgated regulations and conformity with those regulations caused injury. 387 U.S. 136 (1967). In the current controversy, the Plaintiffs did not change their position in reliance on the recommendations of the Secretary and the Commission. In fact, the Plaintiffs would not be injured but for the President's *acceptance* of the Commission's recommendations. Further, while the reviewability of Presidential action under the APA may have been an open question before *Franklin*, *Franklin* holds that Presidential action is not reviewable under the APA. 60 U.S.L.W. at 4785.

The holding and reasoning of *Franklin* are directly applicable to the facts of the present controversy. In *Franklin*, the Supreme Court stated that agency action is "final" when an agency "complete[s] its decision-making process and . . . the result of that process is one that will *directly* affect the parties." *Id.* at 4784 (emphasis added). The *Franklin* court examined a number of statutes which created interlocking responsibilities between agencies and the Executive. *See eg.* 20 U.S.C. § 1017(d); 30 U.S.C. § 1315(c); 42 U.S.C. § 3015(f); 42 U.S.C. § 6633 (b)(2). The Court distinguished statutes under which the President is expressly required to transmit an agency's report directly to Congress from those in which the President is not so required, and held that while the former may generate final agency action, the latter do not. *Id.*

Under the Base Closure Act, the President is not required to submit the Commission's recommendations

to Congress. In fact, under the Base Closure Act, the President has even greater discretion than in the case of the census in *Franklin*. Under the Constitution, the President can not halt the taking of the census whereas, under the Base Closure Act, the President has the power to terminate the base closure process by not transmitting an approved list of recommendations to Congress. Because the President is not required to transmit the Commission's recomendations to Congress, the recommendations carry no *direct* consequences for base closure and, therefore, are not final agency action.

At oral argument, Plaintiffs sought to distinguish *Franklin* from the case at bar by noting that in *Franklin* the Supreme Court stated that the Secretary of Commerce's report to the President was an unusual candidate for consideration as agency action within the APA. The Supreme Court said that the Secretary of Commerce's role in regard to the census was difficult to classify as agency action because, among other things, the Secretary of Commerce's report is not promulgated to the public in the Federal Register and no administrative record is generated. *Id.* at 4783. Plaintiffs argued that because the Commission's actions are subject to publication in the Federal Register and because the Commission is required under the Act to hold public hearings before issuing its recommendations, the Commission's issuance of recommendations can be more readily viewed as agency action than the Secretary of Commerce's report. The Plaintiffs suggest that because the Commission's actions fall into a more traditional pattern of agency proceedings, its actions are reviewable despite the Supreme Court's conclusion that the Secretary of Commerce's actions are not. This argument is inap-

posite because even if the Commission's actions are more readily classified as agency action, it is the determination of what constitutes *final* agency action that is of significance here.

Plaintiffs also seek to distinguish *Franklin* by suggesting that *Franklin* precludes only substantive challenges to agency action and not claims that an agency followed improper procedures. Pls.' Response Defs.' Mot. Summ. J. at 15. This distinction is flawed because under *Franklin*, the finality of an agency's action does not turn on the nature of the challenge to it. Under the Base Closure Act the only final action would be that of the President. Permitting judicial review of an intermediate step in the process, even on purely procedural grounds, would be inconsistent with *Franklin* and would ignore the limitation imposed by the APA.

IV. CONCLUSION

Accordingly, Defendants' Motion for Summary Judgment is *GRANTED* [1].

SO ORDERED

/s/ Morton A. Brody
MORTON A. BRODY
United States District Judge

Dated at Bangor, Maine this 18th day of September, 1992.

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[1] In light of this disposition the other arguments raised by Defendants in support of their motion need not be addressed.

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